No. ___

IN THE

Supreme Court of the United States

MILTON GREEN,
Petitioner,

v.

CHRISTOPHER TANNER, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ALICIA CAMPBELL
JOHN CAMPBELL
CAMPBELL LAW LLC
202 S. Meramec Street
Suite 202
St. Louis, MO 63105
(888) 588-5043

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

Counsel for Petitioner

September 5, 2025

JAVAD M. KHAZAELI
JAMES R. WYRSCH
JOHN M. WALDRON
KHAZAELI WYRSCH LLC
911 Washington Avenue
Suite 211
St. Louis, MO 63101
(314) 288-0777

QUESTIONS PRESENTED

1. In a case alleging that an officer used excessive force based on a mistake of fact, is the reasonableness of the officer's mistake a legal question for a court at summary judgment or a factual question for a jury?

2. May an officer's use of deadly force be deemed reasonable as a matter of law based on facts that were not known to the officer at the time or based on a view that "[t]here is no constitutional … right that prevents an officer from using deadly force when faced with an apparently loaded weapon"? App. 14a.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Milton Green was the plaintiff in the district court and the appellant in the Eighth Circuit.

The City of St. Louis and Christopher Tanner in his individual capacity were the defendants in the district court and the appellees in the Eighth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Green v. City of St. Louis, et al.*, No. 19-0711 (E.D. Mo.) (memorandum and order granting summary judgment to the defendants, issued March 6, 2023; memorandum and order denying the plaintiff's motion to alter the court's judgment or amend and submit newly discovered evidence, issued April 28, 2025)
- *Green v. City of St. Louis, et al.*, No. 23-2087 (8th Cir.) (opinion affirming the district court's grant of summary judgment, issued April 8, 2025)

There are no other proceedings in state or federal court, or in this Court, that directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

INTRODUCTION

Police officers sometimes make mistakes. Sometimes they misperceive or misapprehend key facts in situations they are facing (or misremember key details afterward). And sometimes, making mistakes about the facts can lead officers to use deadly force when deadly force is not in fact necessary. When that happens, whether the officer's use of deadly force was justified will often turn on whether his factual mistakes were objectively reasonable.

The officer in this case, Christopher Tanner, made a whole lot of factual mistakes. Perceiving someone to be a dangerous criminal fleeing police, Tanner said that he used deadly force because the man was pointing a gun at him, staring at him, and defying orders to drop the gun.

None of this was true. The person he shot was not a dangerous criminal—he was an off-duty officer outside his own home. The off-duty officer did not point a gun at Tanner—he pointed his gun at the ground while holding his badge in his other hand. The off-duty officer was not facing Tanner—he was walking away from Tanner, to a fellow officer who had just called him over after yelling: "There's an off-duty police officer here, don't shoot." And the off-duty officer was not defying commands to drop the gun—he was shot before he ever had the chance to do so.

Were these factual mistakes objectively reasonable? And more fundamentally: Who decides this question? Is it a question of fact for a *jury* or a question of law for a *court*?

Both courts below held that it is a question of law for a court and that Tanner's mistakes of fact were reasonable. In granting summary judgment to Tanner, the district court relied on the one mistake that Tanner is adamant he *didn't* make: mistaking the badge for a gun. According to Tanner, from his angle, he could not see the badge *at all*.

Affirming, the Eighth Circuit rejected the argument that the reasonableness of Tanner's factual mistakes (whether real or invented) "is a question of fact for the jury." App. 14a. Like the district court, the Eighth Circuit held that this is a question of law for a court. *Id.* And like the district court, the Eighth Circuit answered this question based on facts concededly unknown to Tanner at the time. It also invoked a seemingly categorical rule that has appeared in many Eighth Circuit cases: "There is no constitutional … right that prevents an officer from using deadly force when faced with an apparently loaded weapon." *Id.*

This Court should grant certiorari. Four circuits have held that the reasonableness of an officer's mistake of fact is a question of fact for a jury, not a question of law for a court at summary judgment. Two circuits have now held the opposite. And one circuit has issued decisions on both sides of the divide. Only this Court can resolve what has become an entrenched circuit split on a fundamental and frequently recurring question about the proper allocation of decision-making power in excessive-force cases.

If the Court does not grant plenary review, it should summarily vacate. Even if the Eighth Circuit were right that the reasonableness of an officer's mistake of fact is a legal question, its answer to that question is plainly wrong. That is clear from this Court's decision in *Barnes v. Felix*, 145 S. Ct. 1353 (2025). Because the excessive-force inquiry is limited to the facts "then known to the officer," it may not turn on facts that were then *un*known to the officer. *Id.* at 1358. And the Constitution has no categorical "on/off switch" authorizing the use deadly force on anyone with a gun. *See id.* At the very least, this Court should grant the petition, vacate, and remand in light of *Barnes* because the Eighth Circuit lacked the benefit of that decision.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 134 F.4th 516 and reproduced at 3a. The district court's decisions are unreported and reproduced at 20a and 26a.

JURISDICTION

The Eighth Circuit entered judgment on April 8, 2025. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

STATEMENT

A. Factual background

On a June night in 2017, Milton Green was outside his house trying to fix a friend's car. He was a 15-year veteran of the St. Louis Police Department, and he had worked a shift as an officer earlier in the day. JA240, 247. When his shift ended, he went to coach a youth football practice and drove some kids home afterward. JA247–48. Now, he was in his driveway helping a friend with car trouble. JA250.[1]

Green didn't live in the best neighborhood. He'd made arrests there before, and he felt that he needed to protect himself while outside at night. JA261. So he had his service weapon and police badge on him, just to be safe. JA260.

Green's precautions turned out to be warranted. As he was working in the driveway, a car crashed outside his neighbor's house. JA257. Two occupants jumped out and ran through the passageway between Green's house and the neighbor's house. JA268, 273. Green and his friend decided to reposition themselves behind another vehicle in the driveway to get a better view. JA264–65. A pursuing car then arrived. Two undercover officers got out and chased after the two fleeing suspects. JA274. While they gave chase, a third suspect exited the crashed car. He ran across Green's yard, to the side of the house where Green and his friend were standing. JA278–80. The suspect was armed, and Green began to hear shooting in the distance. JA279. The third suspect dropped to the ground. After a while, he got up and began pointing his gun at the vehicle that Green was behind. JA284. Green put his badge

---

[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout. The joint appendix in the Eighth Circuit is cited as "JA."

around his neck, drew his weapon, and yelled, "Police, put the gun down"! JA285–86. The suspect took off running, keeping his gun aimed toward Green as he fled. JA286.

Green then heard a voice shout from behind him: "Put your weapon down." *Id.* He figured that this command came from a fellow officer and immediately complied. He "dropped the gun down quickly" and "went prone." JA290. He yelled: "I'm a police officer. I live here. My name is Milton Green." JA288; *see* JA570–72. He stayed on the ground for a minute, but surprisingly, no one came over to him. JA295. Green began to get worried that no one had checked on him or confirmed that he was an officer. JA298–99. So he started to crawl back toward where he had been, and he could see an officer whom he recognized (Brett Carlson) handcuffing his friend. JA296; *see* JA570, 577. Green asked, "Brett, is that you?" JA298. Detective Carlson said yes, "Milton, is that you?" *Id.*; *see* JA574. Green said that it was and asked Carlson if he could "[t]ell these officers who I am." JA298. Carlson then yelled out: "There's a[n] off-duty police officer here, don't shoot. His name is Milton Green. He lives here. Don't shoot." JA301.

By that point, it had been two or three minutes since the sound of gunfire, and the suspects were no longer near Green's house. JA296. Carlson "looked around, didn't see anything," and told Green: "Milton, come over here by me." JA302; *see* JA588–89. Because of Carlson's warning, Green "felt safe enough to get up." JA305–06. He took his badge off his neck, held it up for other officers to see, and retrieved his gun from the ground. JA304, 375. He kept the gun down at his side, holding it in his right hand with the muzzle facing the ground, while his badge was in his left hand. JA314, 331. Green then walked to Carlson, as instructed. JA331, 589. But before he got there, Green was

shot by Tanner, who was approaching from 50 feet away, at an angle behind Green and to his side. JA2077–81. After Green was hit, Carlson cried out: "You shot Milton. I told you not to shoot him. I told you not to shoot him." JA332.

Tanner later claimed that he fired in self-defense. He testified that, although Green was "turned the other way," JA97, Green suddenly "made eye contact" with Tanner and raised his gun "above his waist," pointing the barrel directly at Tanner and his partner, Matt Burle. JA107–09, 165. Tanner said that he then gave Green multiple orders to drop the gun, but Green refused. JA81, 102–04, 108, 121. So Tanner shot him. JA117 ("Q. Why did you shoot him? A. Because he brought the pistol up. … And I told him to drop the gun, [and] he didn't drop the gun.").

Tanner aimed to kill. But he missed his target and hit Green's elbow. JA81, 357, 1348. According to Tanner, he could not see Green's left hand at all, so he couldn't see the badge and didn't know that Green was an officer. JA115. He could see only Green's right hand, which had the gun. Tanner further testified that he could not see anyone but Green when he fired and had no idea other officers were nearby. *See* JA101 ("I could not see anybody else. All I saw was Milton."); JA68, 118, 144. On Tanner's telling, then, he acted to protect himself and his partner against a non-compliant suspect who was pointing a gun at them. JA118.

The other officers at the scene, however, testified that this was not true. Carlson said that Green kept his weapon below his waist and pointed to the ground, and that Green was walking to Carlson and "looking right at me" when he was shot. JA589; *see* JA601. Carlson never heard anyone give a warning. JA601. In other words: Green didn't do "anything wrong." JA602. Other officers said the same. They saw Green walking slowly to Carlson, as Carlson had

told him to do, without raising his gun or making "any sort of erratic moves or sudden moves," and they heard no warnings before he was shot. JA2261–62; *see* JA2456.

Green himself also contradicted Tanner's account. He testified that he had his gun at his side the whole time and kept it "[p]ointed down to the ground," while holding up his badge with his left hand. JA317–18, 328, 331, 446. He could recall hearing a single warning right as he was shot, but he was not given any time to comply. JA338, 365, 370.

The shooting proved devastating for Green, who is now permanently disabled. He was unable to return to duty, JA241, ending his career in the force. And after losing his job, Green would also lose his house and marriage, which suffered under the strain of his being out of work. JA397.

As for Tanner, he wasn't disciplined for the shooting. But he was later fired for having a blood-alcohol level of .06 several hours into a shift in 2019. JA1100–05. He went to another department, where he was again disciplined and resigned. JA1105–06. Further, because he is white and Green is black, the shooting set off controversy in the city's police department. *See* John Eligon, *A White Officer Shoots a Black Colleague, Deepening a Racial Divide*, N.Y. Times (Nov. 24, 2019), https://perma.cc/MV7T-4CQJ.

B. Procedural background

Green sued Tanner and the city of St. Louis, alleging (among other things) violations of the Fourth and Fourteenth Amendments. Jurisdiction was based on 28 U.S.C. § 1331. The defendants sought summary judgment on all claims, including the excessive-force claim against Tanner and a *Monell* claim against the city.

The district court's decisions. The district court granted summary judgment as to all claims. App. 43a. It

held that Tanner's use of deadly force was justified as a matter of law because—even though there was ample evidence that Green had his gun down and was facing away from Tanner—"Tanner perceived that [Green] was pointing a gun at him" and that an advance warning would not be "feasible." App. 35a–36a. The court held that these mistakes of fact were reasonable as a matter of law.

The court based its holding on two conclusions. *First*, the court rejected Green's argument that "the jury must decide whether defendant Tanner's mistake [of fact] was reasonable." App. 38a. *Second*, answering this question itself, the court concluded that Tanner's mistake of fact was "reasonable as a matter of law" because he mistook Green's "badge for a gun," and his "mistaking [Green's] badge for a gun was reasonable," App. 39a—even though Tanner testified that he had not seen the badge *at all*.

The court then addressed the *Monell* claims. Because "Tanner's use of force was objectively reasonable," it explained, the city could not be held liable. App. 40a.

Green moved to alter or amend the judgment, pointing out that Tanner had conceded that he didn't see Green's badge. App. 21a. The court denied the request. Although it now acknowledged Tanner's concession, the court stuck to its conclusion that "Tanner's mistake of fact … was reasonable." App. 22a. It did not explain how Tanner could have reasonably perceived that a gun aimed at the ground and held at Green's side while he was walking away from Tanner was in fact a gun aimed at Tanner as Green stared at him and defied his orders. Nor did the court explain why this conclusion was mandated as a matter of law.

The Eighth Circuit's decision. The Eighth Circuit affirmed the district court's grant of summary judgment to the defendants. App. 2a. It agreed with the district

court that Tanner's use of lethal force was justified as a matter of law. And it agreed that the reasonableness of an officer's mistake of fact is a question of law for a court, not "a question of fact for the jury." App. 14a.

But the Eighth Circuit adopted its own theory of why Tanner was authorized to use deadly force in this case as a matter of law. The Eighth Circuit acknowledged that Green was an off-duty officer who was walking toward Carlson and away from Tanner with his gun aimed at the ground. App. 6a. Yet, according to the Eighth Circuit, "[i]f Officer Green was the third suspect and was approaching officers with a gun *pointed to the ground*, there was still a serious risk he could raise the gun and fire at the officers in a split second." App. 14a. For that reason—"Officer Tanner seeing a perceived suspect confronting officers with a gun in his hand"—he was authorized to use deadly force to protect those officers from harm. App. 15a–16a. The court did not attempt to square this conclusion with its earlier acknowledgment that "[t]here is no evidence Officer Tanner saw Officer Green approach officers," App. 13a, and that Tanner had in fact "testified that he did not see Detective Carlson as [he] approached." App. 6a.

The Eighth Circuit was also guided by its view that "[t]here is no constitutional or statutory right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a (quoting *Rogers v. King*, 885 F.3d 1118, 1122 (8th Cir. 2018)). Under that view of the law, because Tanner was "faced with an apparently loaded weapon," he was authorized to kill.

Having held that "Tanner did not violate Officer Green's constitutional rights," the Eighth Circuit then held that there was "no error in granting summary judgment to the City" on Green's *Monell* claims. App. 17a.

REASONS FOR GRANTING THE PETITION

This petition presents two questions. The first is a pure question of law concerning the allocation of decision-making authority in excessive-force cases: Is the reasonableness of an officer's mistake of fact a legal issue for the court or a factual issue for the jury? This question has split the circuits; the Eighth Circuit directly answered the question, and its answer is incorrect. The Court should therefore grant plenary review as to this question.

The Court should also grant certiorari as to a second question: whether an officer's use of deadly force may be deemed reasonable as a matter of law based on facts that were unknown to the officer at the time, or based on a view that "[t]here is no constitutional … right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a. Although this Court could grant plenary review on this question, the Eighth Circuit's answer is so clearly wrong that summary vacatur would also be appropriate. This Court has summarily vacated in cases like *Tolan v. Cotton*, 572 U.S. 650 (2014), and *Lombardo v. City of St. Louis*, 594 U.S. 464 (2021). This case is equally deserving of that treatment.

I. The first question should be granted because it has divided the circuits, is squarely presented, and the Eighth Circuit's answer is incorrect.

Take the first question first. Everyone agrees that, in excessive-force cases (as in cases in general), it is the jury's job to find the historical facts. And everyone agrees that, under this Court's decision in *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2008), the ultimate question whether the officer's use of force is objectively reasonable is a question of law that may be decided by a court at summary judgment if there is no genuine dispute of material fact.

But what about cases where an officer used force based on a mistake of fact—meaning, a mistake about the officer's perception of the objective reality of the situation before him? "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Heien v. North Carolina*, 574 U.S. 54, 66 (2014). Who, then, is tasked with deciding whether an officer's mistake of fact was a reasonable one—the judge or the jury?

The Eighth Circuit below held that this is a question of law for the court, not "a question of fact for the jury." App. 14a. Other circuits, however, have held the opposite. As a result, there is now a stark circuit conflict concerning a fundamental and frequently arising question, and this case presents an opportunity for this Court to resolve it.

A. The circuits are split on this question.

The circuits fall into three basic groups. At least four circuits (the Second, Third, Ninth, and Tenth) have expressly held that the jury must determine whether an officer's asserted mistake of fact was objectively reasonable. By contrast, at least two circuits (the Eighth and Eleventh) have expressly held that the court must determine this question. And at least one circuit (the Fourth) has issued what appear to be conflicting decisions.

Group one: It's a factual question for a jury. A clear majority of circuits hold that the objective reasonableness of an officer's asserted mistake of fact is a question of fact for the jury, not a question of law for the court.

The Tenth Circuit is one of them. In that circuit, the "reasonableness of a mistake" of fact made by an officer is "a question of fact rather than a matter for the court to decide as a matter of law." *Est. of Harmon v. Salt Lake*

City, 134 F.4th 1119, 1127 (10th Cir. 2025). This means that if an officer claims that he mistakenly believed that the plaintiff "was pointing a gun at him at the precise moment" that he used deadly force, the reasonableness of his "mistaken perceptions" will be a "factual question" for the jury and not a "legal issue" for the court. *Clerkley v. Holcomb*, 121 F.4th 1359, 1364 (10th Cir. 2024). The same is true if an officer says that he "reasonably believed" that the plaintiff "was making hostile motions with a knife." *Harmon*, 134 F.4th at 1127. That, too, will be a question for the jury. And if "the jury could regard [his] factual mistake as unreasonable"—for example, because a second officer who "had a clear view" of the events directly contradicted his testimony—"the mistake wouldn't entitle [the defendant] to summary judgment." *Id.*; *see also Attocknie v. Smith*, 798 F.3d 1252, 1257 (10th Cir. 2015) (Hartz, J.); *accord Love v. Grashorn*, 134 F.4th 1109, 1112 (10th Cir. 2025), *cert. petition docketed*, No. 25-216.

That is also the rule in the Ninth Circuit. When an officer in that circuit claims that he made a reasonable mistake of fact, it is for "a jury to determine first whether the mistake was, in fact, reasonable." *D'Braunstein v. Cal. Highway Patrol*, 131 F.4th 764, 772 (9th Cir. 2025) (Bress, J.). The Ninth Circuit has recognized this rule in case after case in recent years. *See, e.g.*, *Est. of Aguirre v. Cnty. of Riverside*, 131 F.4th 702, 709–10 (9th Cir. 2025) (the question "whether a reasonable officer would have or should have accurately perceived a mistaken fact" was for the jury); *S.R. Nehad v. Browder*, 929 F.3d 1125, 1134 (9th Cir. 2019) ("A reasonable trier of fact could, however, conclude that [the officer's] mistake was not reasonable."); *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1173 (9th Cir. 2013) ("The district court … conclud[ed] that whether [an officer's] mistake [of fact] was reasonable

is a question for the jury. We agree."); *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) ("Taking into account all the facts and circumstances facing [the officer] at the time of the mistaken shooting, a reasonable jury could find that her mistake was unreasonable.").

The Ninth Circuit has even applied this rule in cases like this one, where an officer shoots an undercover or off-duty colleague based on a mistake of fact. In that scenario, the Ninth Circuit has held that "the question of whether officers made a reasonable mistake when they shot their own undercover colleague must be submitted to a jury." *Johnson*, 724 F.3d at 1173 (describing *Wilkins v. City of Oakland*, 350 F.3d 949, 955–56 (9th Cir. 2003)). Ditto for cases where an officer claims to have mistaken an object in the plaintiff's hand for a weapon. *Nehad*, 929 F.3d at 1134 ("Whether Browder reasonably mistook the pen for a knife is therefore a triable question of fact.").

The Third Circuit has articulated the same rule—also in a case involving an officer-on-officer shooting. In that case, as in this one, the defendant testified that (a) "he saw a black male with a gun in his hand" who "was pointing it directly at him," (b) he "shouted three times for the man with the gun … to drop his gun," and (c) the man did not do so. *Curley v. Klem*, 499 F.3d 199, 202 (3d Cir. 2007). "Immediately after he fired, someone screamed to him that he had just shot a cop" and not the suspect whom he had been after. *Id.* at 203. The officer did not attempt to defend his actions by arguing that he had "made a mistake of law—wrongly believing that it was legal to shoot the wrong person"—but rather that he had made a "factual mistake" by misperceiving the situation in front of him. *Id.* at 215. The Third Circuit held that "whether the officer made a reasonable mistake of fact" was for the jury. *Id.*

The Second Circuit is in accord. There, too, "disputed material issues regarding the reasonableness of an officer's perception of the facts (whether mistaken or not) is the province of the jury, while the reasonableness of an officer's view of the law is decided by the district court." *Jones v. Treubig*, 963 F.3d 214, 231 (2d Cir. 2020) (Bianco, J.). The Second Circuit has "repeatedly held" that this is the rule. *Vega-Colon v. Eulizier*, 2024 WL 3320433, at *5 (2d Cir. 2024). Under this rule, if an officer professes to have had a sincere but mistaken belief that a suspect was resisting arrest, for example, it will be "the jury's role to consider the reasonableness of [that] stated belief." *Jones*, 963 F.3d at 232. The "reasonableness of any mistaken perception of the facts" presents "factual issues" that "a jury must resolve." *Vega-Colon*, 2024 WL 3320433 at *5.

Each of these circuits has thus explicitly held that the reasonableness of an officer's asserted mistake of fact is for the jury. Two other circuits, meanwhile, have done so implicitly. *See Trabucco v. Rivera*, 141 F.4th 720, 733 (5th Cir. 2025) (upholding jury finding that a mistake of fact was reasonable); *Hicks v. Scott*, 958 F.3d 421, 434 (6th Cir. 2020) (denying summary judgment because a jury could find that a factual mistake was unreasonable); *cf. Webb v. United States*, 789 F.3d 647, 670 (6th Cir. 2015) ("Whether it was objectively reasonable … to mistake a 5'9" suspect to be 6'3" remains a factual question for the jury.").

Group two: It's a question of law for a court. But not every circuit agrees. Breaking from the majority view, two circuits have held that the reasonableness of an officer's asserted mistake of fact is a legal question for a court.

That is what the Eighth Circuit held in this case. Green argued below that "the jury must decide whether … Tanner's mistake [of fact] was reasonable." App. 38a. The

district court rejected this argument and held that Tanner's mistake was "reasonable as a matter of law" because, in its view, Tanner reasonably mistook Green's "badge for a gun." App. 39a. Citing the rule in the other circuits, Green then argued on appeal that the court erred in deciding the reasonableness of Tanner's purported factual mistake for itself. He "argue[d] that determining whether Officer Tanner was reasonably mistaken in thinking Green" was holding a gun in his left hand—and not a badge—"is a question of fact for the jury." App. 14a.

The Eighth Circuit expressly "disagree[d]." *Id.* It held that the reasonableness of a mistake of fact is a "question of law" for a court at summary judgment. *Id.* In doing so, the Eighth Circuit made explicit what some of its previous opinions had made implicit, leaving no doubt as to the rule going forward. *See, e.g.*, *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) (deciding reasonableness of an officer's mistake of fact—believing that an object in the plaintiff's hand was a gun—as a matter of law); *Partlow v. Stadler*, 774 F.3d 497, 503 (8th Cir. 2014) ("It is possible that the officers were mistaken in perceiving that Partlow was taking aim at them. Any such mistake, however, was objectively reasonable in light of the circumstances known to the officers."); *id.* at 504 (Bye, J., dissenting) (arguing in dissent that "[a] jury should determine whether it was objectively reasonable for the officers to have the allegedly-mistaken perception" of fact—not the court).

The Eighth Circuit is not alone in this view. At least one other circuit has taken the same position. In *Simmons v. Bradshaw*, the Eleventh Circuit held that, although "the question of what circumstances existed at the time of the encounter is a question of fact for the jury," "the question of whether the officer's perceptions … were objectively

reasonable under those circumstances is a question of law for the court." 879 F.3d 1157, 1164 (11th Cir. 2018); *accord Montero v. Nandlal*, 682 Fed. App'x 711, 718 (11th Cir. 2017) (Walker, J., concurring) ("[T]he court should have determined for itself and without jury input whether [the officer] made an objectively reasonable mistake of fact.").

These two circuits have thus adopted the opposite view as the four circuits in the majority. Whereas the majority position treats the reasonableness of an officer's mistake of fact as a factual question for a jury to decide based on the evidence, the minority position treats it as a legal question for the court to decide at summary judgment.

Group three: Decisions on both sides. Then there is the Fourth Circuit. That court has held en banc that an officer's mistaken use of a gun instead of a Taser "could be viewed by a jury as objectively unreasonable." *Henry v. Purnell*, 652 F.3d 524, 527, 532–33 (4th Cir. 2011) (en banc). Following this decision, some cases in the Fourth Circuit treat the reasonableness of an officer's asserted mistake of fact as a factual question for the jury. *See, e.g.*, *Aleman v. City of Charlotte*, 80 F.4th 264, 292 (4th Cir. 2023) (holding that a jury could find that "Officer Guerra's account of the fatal shooting was either contrived or unreasonably mistaken"). Other cases, however, treat the reasonableness of an officer's asserted mistake of fact as a "legal judgment" for a court. *See, e.g.*, *Putnam v. Harris*, 66 F.4th 181, 187 (4th Cir. 2023); *cf. Armstrong v. Hutcheson*, 80 F.4th 508, 513 (4th Cir. 2023) (suggesting that only "historical facts" are for the jury). As a result, the law in this circuit appears to be unsettled in practice.

The circuit conflict could thus hardly be starker. The circuits "are badly split on the allocation of decision making between judge and jury, sometimes even within a

particular circuit." Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 Rev. Litig. 65, 65 (2009). If Tanner had shot Green in Denver or Seattle, the court would have treated the reasonableness of his mistakes as a jury issue. But because it happened in St. Louis, the court decided the question for itself.

B. The question is important, this case is a strong vehicle, and the decision below is incorrect.

This Court should take the opportunity to resolve the division in the circuits and bring uniformity to the law.

First, the question is both fundamental and frequently recurring. The need to determine and maintain the proper "allocation of decision-making responsibilities between judge and jury in suits seeking damages for constitutional violations" is of great "significance." *Id.* at 66. And given that "the allocation of decisional roles arises frequently in § 1983 cases," the demarcation must be clear. *Id.* at 69.

Second, the question presents a pure question of law. If the Court were to grant certiorari on this question, it would not have to referee any dispute about the facts here.

Third, this case presents a good vehicle for deciding the question. Both courts below explicitly rejected Green's argument that the reasonableness of an officer's factual mistake "is a question of fact for the jury." App. 14a; *see* App. 38a. And both courts explicitly held that the question was for a court at summary judgment. App. 14a; App. 39a.

Finally, the Eighth Circuit's answer to the question is incorrect. Viewing the record in the light most favorable to Green, Tanner made a slew of factual errors. Green was *not* a criminal. He was *not* pointing his gun at Tanner. And he did *not* disobey Tanner's orders. Green was instead an off-duty officer outside his home. He was facing away from

Tanner—walking to Carlson as he'd been told to do—as he held his gun to the ground with his badge up in his other hand. And he was given no time to comply with a warning.

Deciding whether all these mistakes were objectively reasonable is a question of fact, not a question of law. It is necessarily bound up with credibility assessments and the jury's determination of what the facts actually were. It is the jury that is tasked with assessing whether Tanner is telling the truth—that is, whether he *in fact* perceived Green to be pointing his gun at him and defying repeated orders, or whether that is instead a post-hoc justification. And that, in turn, is inseparable from the reasonableness inquiry. Although reasonableness is an objective test, what the officer actually perceived bears on the question of what an officer reasonably would have perceived.

This Court's decision in *Tolan v. Cotton* supports this conclusion. 572 U.S. 650. There, the Court vacated a grant of summary judgment to an officer who used deadly force, explaining that "[a] jury could well have concluded that a reasonable officer would have heard [the decedent's] words not as a threat, but as a son's plea not to continue any assault of his mother." *Id.* at 659. This explanation is consistent with the view that a jury must decide how an officer would reasonably perceive a situation. It is not consistent with the Eighth Circuit's contrary holding.

Nor is the Eighth Circuit's holding consistent with the common-law history. As Justice Gorsuch recently noted, in excessive-force cases, "reasonableness is the totality of the circumstances. And, at common law, these are all questions for the jury." Tr. of Oral Arg. at 37, *Barnes v. Felix*, 145 S. Ct. 1353 (2025); *see, e.g.*, *State v. Pugh*, 7 S.E. 757, 757 (N.C. 1888); *State v. Smith*, 103 N.W. 944, 945–46 (Iowa 1905). The Eighth Circuit's approach, however,

treats some of these questions as legal questions for a court. In doing so, it contravenes this history.

The Eighth Circuit justified its approach by relying on *Scott v. Harris*, 550 U.S. at 381 n.8. But it badly overread that decision. *Scott* involved a scenario where all the relevant facts could be determined by watching a video. Because there was no genuine dispute of fact, the Court was able to decide the ultimate constitutional question—was the force unreasonably excessive?—as a question of law. *Id.* But that says nothing about how courts should treat the reasonableness of an officer's mistake of fact. When an officer makes a mistake about the objective reality of the situation before him, determining whether that mistake is reasonable is not opining on the law. It is simply making a factual assessment about how an officer would perceive the reality of a particular factual scenario.

That does not mean that this assessment will always go to a jury. *Scott* shows why. If no rational juror could find that the mistake of fact was unreasonable, summary judgment may be warranted depending on the other facts. But that's not because it's a legal question. It's because it's a factual question as to which there is no genuine dispute.[2]

In short, the Eighth Circuit asked the wrong question. It should have asked whether *a jury* could fairly conclude that Tanner acted unreasonably in believing that Green was pointing his gun at him and defying commands. The Eighth Circuit didn't do so. Its judgment should therefore be vacated so that it can answer the correct question.

---

[2] In addition, officers are still protected by the doctrine of qualified immunity. So even if an officer violated constitutional rights by making an unreasonable mistake of fact, he will be immune from suit if his violation was not apparent under clearly established law.

II. If the Court does not grant plenary review, it should grant the petition, summarily vacate the Eighth Circuit's judgment, and remand the case.

As an alternative to plenary review, this Court could summarily vacate. Even if the Eighth Circuit correctly held that the reasonableness of an officer's mistake of fact is a question for a court and not a jury, its answer to that question is egregiously wrong and should not be permitted to stand. It rests on an obvious misapprehension of this Court's excessive-force precedents, because it allows the reasonableness of an officer's use of force to turn on facts that were concededly unknown to the officer at the time that the force was used. And it rests, further, on a clear misstatement of the law that has repeatedly appeared in Eighth Circuit cases—that "[t]here is no constitutional … right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a.

Both legal errors were readily apparent when the Eighth Circuit issued its decision. But they are even more apparent now that this Court has decided *Barnes v. Felix*, 145 S. Ct. 1353 (2025). In that case, this Court underscored that the objective-reasonableness inquiry looks to all the facts that were "then known to the officer" who used the force—but not any facts that were then *un*known to the officer. *Id.* at 1358. And the Court in *Barnes* squarely held that "[t]here is no easy-to-apply legal test or on/off switch in this context," *id.*—including a test that would make deadly force permissible whenever someone is carrying "an apparently loaded weapon," App. 14a. Because the Eighth Circuit lacked the benefit of this decision, the Court could also grant the petition, vacate, and remand in light of *Barnes*. *See Bauer v. Marks*, No. 24-616, 2025 WL 1496491 (2025) (post-*Barnes* GVR of Eighth Circuit case).

A. The Eighth Circuit's holding that deadly force may be justified as a matter of law based on facts that were concededly unknown to the officer at the time warrants summary vacatur.

Quite apart from its error in seizing the mistake-of-fact question for itself, the Eighth Circuit's decision is indefensible. The court held that Tanner acted reasonably as a matter of law even if his only account of why he used deadly force—that Green was defying commands while pointing his gun at Tanner, JA117—is false. Even if a jury were to reject this account, the Eighth Circuit reasoned, his actions would still be justified as a matter of law based on him "seeing a perceived suspect confronting officers with a gun in his hand," which "made this a split-second decision" where no warning was feasible. App. 15a.

This reasoning is manifestly incorrect. Not only did the Eighth Circuit acknowledge that "[t]here is no evidence Officer Tanner saw Officer Green approach officers," but it acknowledged that Tanner in fact "testified that he did not see Detective Carlson"—or any other officers—when he fired his weapon. App. 6a, 13a; *see* JA144 ("I know for a fact I didn't see any other cops."). Thus, viewing the record in the light most favorable to Green, Tanner did *not* "see[] a perceived suspect confronting officers with a gun in his hand." *Contra* App. 15a. So that fact should not have been analyzed as part of the totality-of-the-circumstances inquiry for objective reasonableness.

As this Court has repeatedly explained, the "inquiry in an excessive force case is an objective one." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The question "is whether the force deployed was justified from the perspective of a reasonable officer on the scene," based on "the facts and circumstances relating to the incident, as then known to

the officer." *Barnes*, 145 S. Ct. at 1358. Because this inquiry focuses on what "the officer knew at the time," *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), courts must examine "the information the officer[] had when the conduct occurred," *County of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017). But courts may not import information that the officer did not have when the conduct occurred. *See White v. Pauly*, 580 U.S. 73, 80 (2017) (per curiam) (assessing reasonableness based on the information known to, and the facts witnessed by, the officer who used the force, not other officers on the scene).

This is a neutral rule of law. In many cases, it will work to the benefit of the officer who used the force. This case, in fact, is one of them: It is why the Eighth Circuit didn't consider the fact that Carlson had just instructed officers not to shoot because "[t]here's a[n] off-duty police officer here," or had just told Green to "come over here by me." JA300–02. Tanner apparently had not yet arrived on the scene when those statements were made or had otherwise not heard them. So they did not factor into the court's totality-of-the-circumstances assessment. *See Penley v. Eslinger*, 605 F.3d 843, 852 (11th Cir. 2010) (assessing officers' use of force from their perspective "based on information known to the subject officers without imputing knowledge known to colleagues positioned elsewhere"); *Hensley v. Price*, 876 F.3d 573, 584 n.6 (4th Cir. 2017) (explaining that a fact "not known to [the officers] at the time the fatal shot was fired" is "irrelevant to [the excessive-force] analysis"); *Cortez v. McCauley*, 478 F.3d 1108, 1140 n.5 (10th Cir. 2007) (Gorsuch, J., concurring in part and dissenting in part) (similar).

The Eighth Circuit erred in failing to apply this rule neutrally. The fact that Green was "approaching officers"

while holding his gun, App. 14a, was *also* a fact of which Tanner was unaware because he did not see other officers. So the possibility that Green "could [have] raise[d] the gun and fire[d] at the officers" cannot possibly justify Tanner's use of deadly force. *Id.* And Tanner himself did not try to justify his actions as necessary to protect officers that he did not see. He tried to justify his actions as necessary to protect *himself* (and his partner next to him). JA118. In ignoring his concessions, the Eighth Circuit plainly erred.

Nor could this error be avoided by reading the Eighth Circuit to adopt the district court's reasoning. *See* App. 15a–16a (asserting without explanation that it "agree[d]" with the district court that Tanner reasonably believed that Green "posed a significant threat of death or serious physical injury to *Officer Tanner* or other officers" (emphasis added)). Although the district court at least recognized Tanner's actual asserted justification—self-defense—its reasoning runs into the same problem as the Eighth Circuit's: his own concessions. Tanner conceded that he did not see the badge in Green's left hand because he could not see Green's left hand *at all*. So the district court's post-hoc theory that Tanner mistook a badge for a gun, and that this mistake of fact is reasonable as a matter of law, is no more defensible than the Eighth Circuit's. It too seeks to import facts into the totality-of-the-circumstances inquiry that were then unknown to Tanner.

The Eighth Circuit's errors are even more glaring than the summary-judgment errors that prompted this Court to summarily vacate in *Tolan v. Cotton*. In that case, the court of appeals held that an officer's use of deadly force did not violate clearly established law and granted qualified immunity. But in doing so, the court "fail[ed] to credit evidence that contradicted some of its key factual

conclusions," so this Court stepped in to correct this "clear misapprehension of summary judgment standards." 572 U.S. at 657, 659. What the Eighth Circuit did here is, if anything, worse. It refused to credit the officer's *own concessions* in holding that there could not have possibly been a constitutional violation *at all*. Summary vacatur is therefore even more warranted.

B. Summary vacatur is further warranted because the Eighth Circuit's "apparently loaded weapon" rule is wrong, could mislead officers, and threatens Second Amendment rights.

Summary vacatur is appropriate for a second reason. In holding that Tanner's use of deadly force was justified as a matter of law, the Eighth Circuit also relied on circuit precedent holding that "[t]here is no constitutional or statutory right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a. The Eighth Circuit has repeated this rule of law many times over the years—so many times, in fact, that district courts in the circuit have recognized that "[t]his principle is well-established in the Eighth Circuit" and "squarely governs" many cases. *Maser v. City of Coralville*, 2023 WL 8526724, at *11 (S.D. Iowa 2023); *see, e.g.*, *Rogers*, 885 F.3d at 1122 (quoting this rule and holding that deadly force was reasonable as a matter of law because the officer had shot someone who was holding "an apparently loaded weapon"); *Dooley v. Tharp*, 856 F.3d 1177, 1183 (8th Cir. 2017) (same); *Aipperspach v. McInerney*, 766 F.3d 803, 807 (8th Cir. 2014) (same); *Sinclair v. City of Des Moines*, 268 F.3d 594, 596 (8th Cir. 2001) (same).

Summary vacatur would allow this Court to put an end to this rule. An "apparently loaded weapon" rule cannot be squared with this Court's excessive-force precedents,

which eschew bright-line rules. Nor is it consistent with the law in other circuits. And it is in serious tension (to say the least) with the Second Amendment, which "protect[s] an individual's right to carry a handgun for self-defense outside the home." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 8 (2022). The rule has no business continuing to appear in the pages of the Federal Reporter.

1. The Eighth Circuit's "apparently loaded weapon" rule contradicts *Barnes* and this Court's excessive-force cases.

The Eighth Circuit's rule purports to be categorical: If someone is carrying "an apparently loaded weapon," there is "no constitutional … right that prevents an officer from using deadly force." App. 14a. The officer may fire away.

But the Fourth Amendment does "not establish a magical on/off switch" for "deadly force." *Scott*, 550 U.S. at 382. It establishes a totality-of-the-circumstances test that requires courts to "slosh [their] way through the factbound morass of 'reasonableness.'" *Id.* at 383. Any attempt to install an "easy-to-apply legal test" in its place is not "reconcilable with th[is] fact-dependent and context-sensitive approach." *Barnes*, 145 S. Ct. at 1358–59.

That is especially clear after *Barnes*. The Court in *Barnes* considered a similar attempt to isolate one fact to the exclusion of all others (there, whether an "officer was in danger at the moment of the threat"). *Id.* at 1357. It refused. Because the moment-of-threat rule "prevent[ed] th[e] sort of attention to context" mandated by this Court's cases, it "conflict[ed] with this Court's instruction to analyze the totality of the circumstances." *Id.* at 1359.

The same is true of the Eighth Circuit's rule. Whether someone has "an apparently loaded weapon" is no doubt a

key fact for an officer to consider in deciding whether to use deadly force on that person. But it is not the *only* fact to consider. Context matters. Because the rule articulated by the Eighth Circuit says otherwise, it cannot stand.

2. No other circuit has articulated this rule.

Unsurprisingly, the Eighth Circuit's rule has no other adherents. No other circuit has quoted an "apparently loaded weapon" rule or adopted anything resembling it. To the contrary, the other circuits uniformly recognize, as then-Judge Barrett put it, that "someone does not pose an immediate threat of serious harm solely because he is armed." *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 693, 700 (7th Cir. 2020). By continuing to recite the "apparently loaded weapon" rule, the Eighth Circuit stands alone.

The only bright-line rule in the other circuits is that there *is* no bright-line rule. "Although the presence or absence of a weapon is a factor in this analysis, it is merely one element in the calculus; the ultimate determination depends on the risk presented, evaluating the totality of the circumstances surrounding the weapon." *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016). Stated another way, "the fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment." *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (O'Scannlain, J.). "Many law-abiding individuals possess weapons for a variety of legitimate purposes, and such mere possession has never alone justified the use of deadly force by law enforcement." *Napouk v. Las Vegas Metro. Police Dept.*, 123 F.4th 906, 917 (9th Cir. 2024) (Van Dyke, J.).

Countless cases from other circuits have recognized as much.[3] In these other circuits, summary judgment will be inappropriate when an officer is claiming "that he believed his life was in danger because of the way [the suspect] was holding the gun," and "the way in which [the suspect] was holding the gun is disputed." *Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015); *see also, e.g.*, *King v. Taylor*, 694 F.3d 650, 662 (6th Cir. 2012).

The Eighth Circuit has at times articulated a similar rule. *See Partridge v. City of Benton*, 929 F.3d 562, 566–67 (8th Cir. 2019) (quoting *Perez*, 809 F.3d at 1220). Under this separate rule, "an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that individual poses an immediate threat of death or serious bodily injury; the suspect must also point the firearm at another individual or take similar 'menacing action.'" *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020) (quoting *Partridge*, 929 F.3d at 566).

But the court below did not apply that rule. It did not ask if there was a material dispute of fact as to whether Green "point[ed] the firearm at another individual or [took] similar menacing action." *Id.* (Which there is.) Instead, it recited its "apparently loaded weapon" rule and declared the force justified. In doing so, it plainly erred. *See Barnes*, 145 S. Ct. at 1359–60 (explaining that it did

---

[3] *See, e.g.*, *Calonge v. City of San Jose*, 104 F.4th 39, 48 (9th Cir. 2024) ("We have held over and over that a suspect's possession of a gun does not itself justify deadly force."); *Betton v. Belue*, 942 F.3d 184, 191 (4th Cir. 2019) ("[A]n officer does not possess an unfettered authority to shoot based on mere possession of a firearm by a suspect."); *Hensley*, 876 F.3d at 582–83 (similar); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (similar); *Thomas v. City of Columbus*, 854 F.3d 361, 366 (6th Cir. 2017) ("[W]e do not hold that an officer may shoot a suspect merely because he has a gun in his hand.").

not matter if "the Fifth Circuit in other cases eschewed a strict time limit" when "the decisions below" didn't do so).

3. The Eighth Circuit's "apparently loaded weapon" rule risks misleading officers and imperiling Second Amendment rights.

Even if the Eighth Circuit does not strictly adhere to its "apparently loaded weapon" rule, the rule's continued appearance in its published decisions causes real harm. It is confusing to officers and poses unnecessary difficulties to courts faced with questions about clearly established law under the doctrine of qualified immunity. All the while, it risks eroding Second Amendment rights.

The best that can be said about the Eighth Circuit's rule is that it's misleading. But that is hardly a justification for its persistence. For years, officers have been told about the rule in bulletins and training materials, creating a risk that they will be misled into thinking that deadly force will be justified in situations when it will not be.[4]

And what about its Second Amendment implications? This Court has held that individuals have a constitutional right to carry loaded firearms in public, *Bruen*, 597 U.S.

---

[4] *See, e.g.*, Brian S. Batterton, *Eighth Circuit: Officers not Unreasonable Shooting Man with BB Gun*, Legal & Liab. Risk Mgmt. Inst. (2015), http://bit.ly/4g4EDcs (police-training materials quoting "apparently loaded weapon" rule verbatim); Brian S. Batterton, *Is Force Excessive if Officer is Mistaken Regarding the Intent of Suspect?*, Legal & Liab. Risk Mgmt. Inst. (2017), https://bit.ly/3JKrglM (same); Elliot B. Spector, *42 U.S.C. Section 1983 Update*, Americans for Effective Law Enforcement, Inc. (Oct. 2002), https://perma.cc/TG9G-FJEF (annual presentation to officers in Minneapolis highlighting Eighth Circuit case that "upheld the summary judgment ruling in favor of the officers finding that no constitutional … right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon").

at 8, and every state in the Eighth Circuit allows them to do so openly. Green was exercising his right while outside his own home. If the state could not pass a law forbidding him from exercising that right, on what basis could it shoot him for doing so? After *Bruen*, it seems particularly pernicious for a circuit to cling to the view that "[t]here is no constitutional … right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a. Before, there was one constitutional right that prohibited such a rule. Now there are two.

CONCLUSION

This Court should either grant the petition and set the case for briefing and argument, or it should summarily vacate the Eighth Circuit's judgment and remand for further proceedings. At the very least, the Court should grant the petition, vacate, and remand in light of *Barnes*.

Respectfully submitted,

DEEPAK GUPTA
JONATHAN E. TAYLOR
Counsel of Record
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

ALICIA CAMPBELL
JOHN CAMPBELL
CAMPBELL LAW LLC
202 S. Meramec Street
Suite 202
St. Louis, MO 63105
(888) 588-5043

JAVAD M. KHAZAELI
JAMES R. WYRSCH
JOHN M. WALDRON
KHAZAELI WYRSCH LLC
911 Washington Avenue
Suite 211
St. Louis, MO 63101
(314) 288-0777

Counsel for Petitioner

September 5, 2025