No. 25-267

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

BRIEF OF THE CATO INSTITUTE, THE LAW ENFORCEMENT ACTION PARTNERSHIP, THE RUTHERFORD INSTITUTE, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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October 9, 2025

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 there is no constitutional right that prevents an officer from using deadly force when faced with an apparently loaded weapon?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement. Cato's interest in this case arises from its commitment to preserving the jury's constitutionally assigned role as a vital check on government abuse and from its concern that insulating officials from accountability corrodes both the rule of law and the public's trust in law enforcement.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than

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

200 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Southern Center for Human Rights ("SCHR") is a Georgia-based nonprofit law firm dedicated to advancing equality, dignity, and justice for people impacted by the criminal legal system. Through litigation and advocacy, SCHR has worked for almost 50 years to defend the civil and human rights of incarcerated people, ensure humane conditions of confinement in jails and prisons, and end degrading law enforcement practices. In light of its experience,

SCHR has a unique perspective on the issues raised in this case, including the constitutional rights of people in prisons and jails, and an interest in ensuring that those rights are protected in any context.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Officer Christopher Tanner claimed that he shot Officer Milton Green, who was off-duty and outside his own home, because Green—despite facing in the opposite direction—had pointed a gun at him and defied his commands. But viewing the facts in the light most favorable to Green, Green actually kept his gun pointed at the ground, displayed his badge, was walking in another direction, and was shot before he could even respond to any command. Green was upholding his oath to protect and serve when Tanner shot him in the arm, permanently disabling him and ending his career. But when Green sought the accountability that 42 U.S.C. § 1983 promises, both courts below treated the reasonableness of Tanner's factual mistakes as a question of law for judges, not one of fact reserved for a jury. The district court concluded that Tanner did not violate Green's constitutional right to be free from excessive force because he could reasonably have mistaken Green's badge for a gun. *Green v. City of St. Louis*, No. 4:19 CV 1711 DDN, 2023 U.S. Dist. LEXIS 36715, at *19–20 (E.D. Mo. Mar. 6, 2023). In doing so, the court abrogated to itself the jury's role as factfinder and the jury's prerogative of making credibility

determinations. The Eighth Circuit affirmed, concluding that even with Green's 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." *Green v. City of St. Louis*, 134 F.4th 516, 525 (8th Cir. 2025).

Displacing the jury's role undermines the justice system prescribed by the Constitution. American juries were conceived as a critical check on government power. The Seventh Amendment codifies this guarantee in civil cases, and § 1983 was enacted precisely to empower ordinary citizens to hold state officials accountable when they trample on federal rights. By converting disputed factual questions of reasonableness into issues of law for judges, the decisions below stripped juries of their constitutionally assigned role and gutted the very mechanism Congress designed to ensure official accountability.

Two further errors mar the Eighth Circuit's decision: That court ruled that judges may even excuse an officer's mistakes based on facts he did not know at the time. And, most shockingly, it effectively held that any time police encounter an armed individual, deadly force is reasonable as a matter of law—thereby endangering the life of every American who exercises his Second Amendment rights. This Court should grant review and reverse the decision below.

ARGUMENT

I. JURIES ARE FUNDAMENTAL TO OUR CIVIL JUSTICE SYSTEM.

The right to a jury trial long pre-dates the Seventh Amendment. "Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen."[2] The Framers understood this right to be a vital check on state power.[3] Thomas Jefferson described the right to a civil jury trial as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[4] James Madison referred to this right as being "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature."[5] These opinions were formed through colonial Americans' experience with harsh abuse. As this Court

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[2] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–54 (1973).

[3] Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1017 (1994) (collecting Founders' statements).

[4] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), https://tinyurl.com/2efzm634 (punctuation modernized).

[5] Hon. Kathleen M. O'Malley, *Foreword: Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1098 (2019) (citing Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (discussing civil cases))).

recently noted, "When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for 'subvert[ing] the rights and liberties of the colonists.'" *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting Resolutions of the Stamp Act Congress, Art. VIII (Oct. 19, 1765), *reprinted in* SOURCES OF OUR LIBERTIES 270, 271 (R. Perry & J. Cooper eds. 1959)). The Stamp Act Congress called trial by jury "the inherent and invaluable right of every British subject in these colonies."[6] Shortly after this, in 1766, George Mason condemned the British for "depriving us of the ancient Tryal, by a Jury of our Equals, and substituting in its[] place an arbitrary Civil Law Court."[7] The First Continental Congress demanded for Americans the "great and inestimable privilege of being tried by their peers of the vicinage."[8] The Congress further protested denial by the British of the "accustomed and inestimable privilege of trial by jury, in cases affecting both life and

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[6] Declaration of Rights of the Stamp Act Congress of 1765, *reprinted in* 2 THE FOUNDERS' CONSTITUTION Art. 1, § 7, Cl. 1, Doc. 3, https://tinyurl.com/4swbm77z.

[7] Letter from George Mason to the Committee of Merchants in London (June 6, 1766), https://tinyurl.com/3sp54p9r.

[8] Declaration and Resolves of the First Continental Congress of 1774, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES doc. no. 398 (Charles C. Tansill ed., 1927), https://tinyurl.com/23jun5c4.

property."[9] The Declaration of Independence accused King George of "[d]epriving us in many cases, of the benefits of Trial by Jury."[10]

The members of the Founding Generation were united in their demand for a civil jury trial guarantee. "One of the strongest objections originally taken against the [then-proposed] constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.).[11] George Mason and Elbridge Gerry noted this as a reason they would not sign the Constitution.[12] Antifederalist concern became so intense that Alexander Hamilton dedicated the Federalist No. 83 to assuring readers that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury."[13]

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[9] Declaration of the Causes and Necessity of Taking Up Arms (July 6, 1775), https://tinyurl.com/4fra6k9w.

[10] *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, https://tinyurl.com/492ckm2z.

[11] *See also* Klein, *supra*, at 1018–19; Wolfram, *supra*, at 660 n.59 & 667.

[12] Wolfram, *supra*, at 660 n.59 & 667.

[13] THE FEDERALIST No. 83 (Alexander Hamilton).

Of course, the Constitution's Framers responded with crucial reassurance of their own, enacting the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

This Court has continued to recognize the importance of civil jury trials. Last year, this Court reaffirmed that the jury trial right is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *Jarkesy*, 603 U.S. at 121 (quotation and internal quotation marks omitted). This Court has also consistently recognized that § 1983 claims, as a "species of tort liability," are appropriate for a jury. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).

In adopting the Seventh Amendment, the Framers secured the civil jury trial right "against the passing demands of expediency or convenience." *Jarkesy*, 603 U.S. at 122 (citation omitted). "[N]o amount of

argument that [a procedural] device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting). "To rule otherwise would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.'" *Id.* "[T]he onerous nature of the [Seventh Amendment] protection is no license for contracting the rights secured by [it]." *Id.*

In sum, the Framers recognized "the right of trial by jury in civil cases as an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or . . . to that of the judiciary." *Id.* at 343. The Seventh Amendment was adopted both to expose official government actions to the scrutiny of ordinary citizens and to ensure that they, not government officials, would be the final arbiters of questions of fact. This safeguard against oppression is central to the constitutional design of our justice system and to § 1983. Congress deliberately empowered ordinary citizens, sitting in judgment as jurors, to hold government officials accountable when they violate people's rights. Preserving the jury's role is essential to both the integrity of the judicial process and the legitimacy of law enforcement in a free society.

II. THE DISTRICT COURT ERRED BY FAILING TO SUBMIT THE QUESTION OF REASONABLENESS TO A JURY.

The constitutionality of an officer's use of force depends on its objective reasonableness. "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). The ultimate determination regarding reasonableness, like that of any disputed question of fact, generally lies with the jury. *See Tolan v. Cotton*, 572 U.S. 650, 659–60 (2014) (per curiam) (holding that whether an officer reasonably perceived a threat was a jury question). Assessing reasonableness does not involve a mechanical inquiry, but rather, a careful examination into the totality of the circumstances. *Barnes v. Felix*, 145 S. Ct. 1353, 1356–58 (2025). The finder of fact must judge the reasonableness of the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Kisela v. Hughes*, 584 U.S. 100, 103 (2018) (per curiam) (quotation omitted).

A. The Reasonableness of Tanner's Use of Force Is a Jury Question, Not a Question of Law to Be Decided at Summary Judgment.

The proper inquiry at summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail

as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). As this Court has emphasized, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. "If reasonable minds could differ as to the import of the evidence," summary judgment is not appropriate. *Id.* at 250. And if there is a genuine factual dispute, the "facts must be viewed in the light most favorable to the nonmoving party." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing FED. R. CIV. P. 56(c)).

Here, the district court identified the determinative issue as whether Tanner's "mistaking plaintiff's badge for a gun was reasonable." *Green*, 2023 U.S. Dist. LEXIS 36715, at *19. In granting summary judgment, the court determined that Tanner's mistake was indeed reasonable, resting this conclusion on *his* account of the events and crediting *his* claim that he saw Green point a gun at him. *Id.* at *14, *19. The court did "not confront the possibility that a jury might reasonably refuse to credit [Tanner's] belief as reasonable," nor that jurors "could well find that [Tanner] is not telling the truth." *Attocknie v. Smith*, 798 F.3d 1252, 1257 (10th Cir. 2015).

Courts cannot use one side's alleged—and disputed—perceptions to override factual disputes and circumvent the prerogative of juries to determine reasonableness. After all, reasonableness depends on

factual assessments: what the officer saw, what was said or done, and how a reasonable officer would have interpreted those circumstances. Reaching conclusions in this regard requires evaluating testimony, weighing credibility, and judging how an ordinary person in the officer's position would have acted. Those are classic tasks for the jury, not the court. Indeed, in *Tolan*, this Court vacated summary judgment for an officer precisely because lower courts had usurped the jury's role in determining how a reasonable officer would have perceived a suspect's conduct. 572 U.S. at 659.

B. Reasonableness Turns Only on the Facts Known to the Officer.

Holding that an officer's use of deadly force toward anyone who is armed is per se justified is illogical, unconstitutional, and dangerous. But that is what the Eighth Circuit's "apparently loaded weapon" rule implies.[14] First, Americans have a Second Amendment right to carry a handgun outside the home. *N.Y. State*

[14] The rule reads: "There is no constitutional or statutory right that prevents an officer from using deadly force when faced with an apparently loaded weapon." *Green*, 134 F.4th at 525 (quotation omitted). No other circuit has such a rule. It is unclear whether the Eighth Circuit rule is categorical. *Id.* at 524–25. But at least facially, it indicates that if an officer believes an armed suspect is in the vicinity and sees someone holding a firearm—even if the weapon is pointed safely at the ground, exactly how a responsible officer would carry it—that officer may, as a matter of law, employ deadly force without warning.

Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 9–10 (2022). According to the Eighth Circuit's view, however, doing so means police can kill them on sight and without warning. Exercising a constitutional right cannot be made into a death warrant.

Second, the Eighth Circuit's rule contradicts this Court's repeated instruction that there is "no 'easy-to-apply legal test' or 'on/off switch'" when it comes to assessing the reasonableness of force. *Barnes*, 145 S. Ct. at 1358 (citation omitted). The fact that a person is armed does not automatically make deadly force reasonable. *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013). This is true even if, as here, a suspect is believed to be in the area. Suppose an armed homeowner calls the police to report a home invasion. If the police arrive at the house and immediately see the homeowner with a firearm, do they get to fire first and ask questions later? Doing so would not always and everywhere be reasonable. Here, a reasonable jury could still conclude, given the totality of the circumstances, that Tanner acted unreasonably in shooting Green, even though Green was armed. *See*, *e.g.*, *Curley v. Klem*, 298 F.3d 271, 275, 280 (3d Cir. 2002) (reversing summary judgment for the defendant in another officer-on-officer shooting case where the defendant claimed he saw a man pointing a gun at him and gave repeated commands to drop it before firing).

The Eighth Circuit also erred in considering facts not known to Tanner: that Green was *approaching other officers* with a *firearm pointed at the ground*.

Green, 134 F.4th at 524–25; *see also id.* at 523 (claiming to consider only "information that the officer possessed at the time of his decision to use such force," before actually considering these additional facts) (citation omitted). This Court has explained that it is only "the facts and circumstances . . . as *then known to the officer*" that matter. *Barnes*, 145 S. Ct. at 1358 (citation and internal quotation marks omitted) (emphasis added); *see also County of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017) ("Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.") (quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)); *Hensley v. Price*, 876 F.3d 573, 584 n.6 (4th Cir. 2017) (labeling a fact not known by the officer at the time of the shooting "irrelevant to [the] analysis").

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"The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). By failing to recognize this, the decision below vitiated the Seventh Amendment. It should be reversed.

III. SHIELDING EXCESSIVE FORCE FROM SCRUTINY ERODES PUBLIC TRUST AND UNDERMINES THE RULE OF LAW.

Insulating excessive force from jury scrutiny not only does injustice to victims, it also undermines the

legitimacy of public institutions by reinforcing the perception that government officers are held to a far lower standard of accountability than ordinary citizens. Communities should have the right to expect that factual disputes about government violence will be resolved by a jury, not determined by judicial fiat. When courts take factual determinations away from juries, they send the message that officers accused of violating constitutional rights enjoy special protections from accountability. The resulting public perceptions, borne out by experience, deepen the divide between law enforcement and the citizenry they serve. Perceptions of abuse abound—and undermine the effectiveness of proper law enforcement.

From 2015 to 2017, law enforcement officers fatally shot, on average, nearly a thousand Americans each year. *See* Julie Tate et al., *Fatal Force*, WASH. POST DATABASE.[15] Tens of thousands more were wounded or injured, to say nothing of those harmed without obvious physical effects.[16] "More people were killed by U.S. law enforcement in 2023 than any other year in the past decade . . . ."[17]

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[15] Available at https://bit.ly/3KPxwpS.

[16] *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 24, 2017), https://bit.ly/44it3TE.

[17] E.D. Cauchi & Scott Pham, *County Sheriffs Wield Lethal Power, Face Little Accountability: "A Failure of Democracy"*, CBS NEWS (May 20, 2024), https://tinyurl.com/5475bbbz.

The decision below will not improve this situation. The Eighth Circuit's "apparently loaded weapon" rule tells officers they are free to fire upon people for exercising their Second Amendment rights. Some police departments have even cited the rule in their training materials. Cert. Pet. 28. The Eighth Circuit's doctrine could potentially lead to more unjustified shootings.

Unfortunately, cases where officers use dubious allegations of danger arising from the presence of firearms as an excuse for shooting people are easy to find:

Willie McCoy was unresponsive, slumped over in his car at a Taco Bell drive-through with a gun in his lap.[18] Rather than taking up a secure position and then ordering Mr. McCoy out of the car, officers stood directly in the line of fire and shouted at him.[19] Within four seconds of rousing him, six officers fired 55 shots and killed Mr. McCoy.[20]

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[18] David French, *The Underexamined Factor in Too Many Police Shootings*, NAT'L REV. (Apr. 4, 2019), https://tinyurl.com/2s39eehp.

[19] *Id*.

[20] Colleen Shalby, *Police Fired More than 55 Rounds at Willie McCoy in Less than 4 Seconds, Report Shows*, L.A. TIMES (June 27, 2019), https://tinyurl.com/24uxuka8.

Philando Castile was stopped for a broken brake light.[21] He told the officer he had a gun.[22] The officer ordered Mr. Castile to retrieve his license and not reach for the gun.[23] Mr. Castile assured the officer that he would do so.[24] But as soon as Mr. Castile reached for his license, the officer shot and killed him.[25]

Andrew Scott, startled by pounding on his door late at night, grabbed his lawfully owned gun and answered the door.[26] He had no way of knowing that the people on the other side were police because the officers did not identify themselves or activate their emergency lights before approaching the wrong house.[27] When Mr. Scott saw unidentified armed people and retreated inside, officers killed him.[28]

It is little wonder that as public awareness of often jaw-droppingly brutal recordings of police misconduct

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[21] David French, *The Unwritten Law That Helps Bad Cops Go Free,* NAT'L REV. (June 21, 2017), https://tinyurl.com/4k8u5ejk; *Philando Castile Death: Police Footage Released*, BBC (June 21, 2017), https://tinyurl.com/yz3kmztb.

[22] BBC, *supra* n.22.

[23] French, *supra* n.22.

[24] *Id*.

[25] *Id*.

[26] David French, *Another Federal Court of Appeals Attacks the Second Amendment*, NAT'L REV. (Mar. 20, 2017), https://tinyurl.com/ymradsfh.

[27] *Id*.

[28] *Id*.

has grown, faith in law enforcement has fallen. In the aftermath of many high-profile police killings, Gallup reported that trust in police officers had reached a 27-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020).[29] For the first time, fewer than half of Americans reported placing confidence in the police, *id.*, and that confidence has not fully recovered.[30]

Negative public opinion has been driven by the perception that officers who commit such misconduct are rarely held accountable.[31] Remarkably, a majority of police officers agree that there is an accountability problem. According to a 2017 survey of more than 8,000 police officers, 72 percent disagreed with the statement that "[o]fficers who consistently do a poor job are held accountable."[32] Between 2005 and 2021, despite thousands of police shootings, just "142 officers have been arrested for murder or manslaughter, [and] only seven have been convicted of murder. An

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[29] Available at https://tinyurl.com/kzmbmsr2.

[30] *See* Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, But Police Up*, GALLUP (July 15, 2024), https://tinyurl.com/7zz4nkax.

[31] *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://nyti.ms/3P33wt8.

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

additional 37 were convicted of lesser offenses, and 53 were not convicted."[33]

Meanwhile, multiple layers of legal insulation shield officers from civil liability. First, one broad study found that around 40 percent of officers' motions to dismiss civil rights claims, or for judgment on the pleadings, were granted for reasons other than qualified immunity. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 56–57 (2017). Second, police officers have a variety of liability-shielding doctrines available to them, including qualified immunity. Even for cases that manage to clear those hurdles, the outcome at trial is far from assured. Finally, even if an officer is ultimately found liable, he is nearly always indemnified. Professor Joanna Schwartz has documented that government employers pay 99.98 percent of all money given to plaintiffs for excessive force claims. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). In one study of over 9,000 cases where plaintiffs received money, "no officer paid more than $25,000, and the median contribution by an officer was $2250." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1806 (2018). There is no justification for adding still more hurdles to recovery

[33] Rick Rouan, *Fact Check: Police Rarely Prosecuted for On-Duty Shootings*, USA TODAY (June 21, 2021), https://bit.ly/44jCoKP.

by letting courts decide factual issues and officers' credibility.

Most police officers, when properly trained and supervised, follow their constitutional obligations. These officers will benefit if the legal system reliably holds rogue officers accountable. In a 2017 survey, a staggering 93 percent of law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings.[34] But under the status quo, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated."[35] The lack of accountability for wrongdoing embodied by the decision below makes life harder for the many officers who do what is right.

CONCLUSION

The decision below stripped jurors of their constitutionally assigned role of deciding whether an officer's mistakes of fact were reasonable. It replaced the common-sense judgment of ordinary citizens with judicial fiat and, even worse, effectively authorized officers to shoot armed individuals on sight. Letting

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[34] *See* Morin, *supra* note 32, at 65.

[35] Jack McDevitt et al., *Promoting Cooperative Strategies to Reduce Racial Profiling*, DOJ OFF. CMTY. ORIENTED POLICING SERVS., 21 (2008), https://bit.ly/3Ean9cF.

the decision stand will further erode public trust in law enforcement.

Courts should feel no "heartburn with the notion that [a] dispute can go to trial." *Spiller v. Harris County*, 113 F.4th 573, 582 (5th Cir. 2024) (Willett, J., concurring) (citation and internal quotation marks omitted). "There, in a solemn United States courtroom," the law "can be vindicated by a jury," rather than "judges playing junior-varsity jury." *Id.*

This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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