No. 25-267

In the Supreme Court of the United States

MILTON GREEN,
Petitioner,
v.

CHRISTOPHER TANNER, ET AL.,
Respondents.

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

REPLY BRIEF OF PETITIONER

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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.

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INTRODUCTION

Is the reasonableness of an officer's mistake of fact a legal issue for a court or a factual issue for a jury? The petition explains why the Court should grant review on this question: It is a pure question of law that has divided the circuits. It is important and frequently recurring. And the Eighth Circuit squarely (and wrongly) answered it.

The respondents do not meaningfully confront any of this. They instead try to reframe the petition as posing an entirely different and uncontroversial question—whether summary judgment may be granted in an excessive-force case "where the undisputed material facts demonstrate that the force used was objectively reasonable." BIO 12. But the petition accepts this settled rule, *see* Pet. 10–11, and asks what belongs in the category of "material facts": Does the jury decide only the historical facts? Or does it also decide the reasonableness of an officer's asserted—but mistaken—perception of the facts, which necessarily involves weighing testimony and assessing credibility? Four circuits have held the latter, while two (including the Eighth Circuit below) have held the former.

As to *this* dispute—the only dispute teed up by the first question presented—the respondents have little to say. They do not address the circuit split or dispute its importance. Nor do they deny that the Eighth Circuit answered the question below. And they offer no reasoned defense of its answer. Plenary review is thus warranted.

In the alternative, this Court could summarily vacate. The respondents do not defend the Eighth Circuit's oft-repeated "apparently loaded weapon" rule. App. 14a. And while they assert that the panel didn't rely on any facts unknown to the officer, its opinion plainly says otherwise. At the very least, this Court should grant, vacate, and remand in light of *Barnes v. Felix*, 605 U.S. 73 (2025).

ARGUMENT

I. The respondents cannot dispel the split.

As the petition explains (at 10), 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 the petition asks a different, antecedent question: What happens when an officer makes a mistake about the objective reality of the situation before him? Who decides the reasonableness of that mistake—the judge or jury?

The Eighth Circuit below held that once the historical (or "predicate") facts are established, whether an officer's factual mistake is reasonable presents a "question of law for the court" rather than a "question of fact for the jury." App. 14a.[1] One other circuit (the Eleventh) has agreed. *See Simmons v. Bradshaw*, 879 F.3d 1157, 1164 (11th Cir. 2018) ("[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.").

By contrast, at least four other circuits (the Second, Third, Ninth, and Tenth) have expressly held the opposite. *See, e.g.*, *Jones v. Treubig*, 963 F.3d 214, 231 (2d Cir. 2020) ("[D]isputed material issues regarding the reasonableness of an officer's perception of the facts (whether mistaken or not) is the province of the jury,

[1] Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

while the reasonableness of an officer's view of the law is decided by the district court."); *Curley v. Klem*, 499 F.3d 199, 215 (3d Cir. 2007) (holding that "whether the officer made a reasonable mistake of fact" was for the jury); *Est. of Aguirre v. Cnty. of Riverside*, 131 F.4th 702, 709–10 (9th Cir. 2025) (holding same as to "whether a reasonable officer would have or should have accurately perceived a mistaken fact"); *Est. of Harmon v. Salt Lake City*, 134 F.4th 1119, 1127 (10th Cir. 2025) ("The reasonableness of a mistake" by an officer is "a question of fact rather than a matter for the court to decide as a matter of law.").

The respondents have no answer to this split. They outright ignore many of the key cases in the majority. For example, they make no mention of the Third Circuit's decision in *Curley*, 499 F.3d at 215, and instead cite (at 15) an earlier decision in the case. *See Curley v. Klem*, 298 F.3d 271 (3d Cir. 2002). They also fail to address several Ninth Circuit cases, which explicitly hold that a jury must "sift through disputed factual contentions" and "draw inferences therefrom" to determine whether an officer's mistake of fact is reasonable. *Torres v. City of Madera*, 648 F.3d 1119, 1125–27 (9th Cir. 2011); *see also Aguirre*, 131 F.4th at 709–10 (explaining that the jury must consider "all of the circumstances known to the officer on the scene" and decide if "any mistake was reasonable").

Even for the cases they acknowledge, the respondents ignore the actual holdings as to the question presented. They disregard, for instance, the Second Circuit's holding in *Jones* that a jury must decide "disputed material issues regarding the reasonableness of an officer's perception of the facts." 963 F.3d at 231. They instead cite the case (at 15) for the entirely unremarkable proposition that, where "there is no material question of fact, the court decides the qualified immunity issue as a matter of law." *Id.* But

that isn't the question here, and it wasn't the question in *Jones* either. The officer in that case professed to have mistakenly believed that the plaintiff was resisting arrest, and the court held that "it was the jury's role to consider the reasonableness of [that] stated belief." *Id.* at 232.

The respondents make the same analytical mistake in discussing the Ninth and Tenth Circuit's cases. Here, too, they fail to engage with the holdings in these cases as to the first question and instead seize on generic statements that summary judgment is appropriate where there is no genuine dispute of fact. But again, that isn't the question. Even if these cases stood for the proposition that "courts, not juries, assess the objective reasonableness of mistakes on undisputed facts," BIO 14, that would be true only because these circuits treat the reasonableness of an officer's mistake of fact as itself a fact for the jury.

The Tenth Circuit's decision in *Clerkley v. Holcomb*, 121 F.4th 1359 (10th Cir. 2024), illustrates the point. That decision directly holds that "the reasonableness of an officer's belief that a plaintiff posed a threat [is] a factual question." *Id.* at 1364. Accordingly, in explaining that a jury decides whether an officer's mistaken belief that the plaintiff "was pointing a gun at him" was reasonable, the Tenth Circuit did not limit its characterization of the "material fact[s]" to the events preceding the officer's mistake. *Id.* Rather, it made clear that the reasonableness of the officer's mistaken perception of the facts "at the precise moment" that he used deadly force was itself a "factual question" for the jury. *Id.*; *see also Harmon*, 134 F.4th at 1127 (applying *Clerkley* where an officer claimed that he reasonably, though mistakenly, believed that the suspect was "making hostile motions with a knife," and holding that the reasonableness of this "mistaken belief" was a "question of fact" for a jury).

The Ninth Circuit has done the same. In *Torres*, for one, it explained that the relevant question was not whether the officer's mistake of fact "was an *honest* one," but "whether it was a *reasonable* one." 648 F.3d at 1127. "Taking into account all the facts and circumstances facing [the officer] at the time of the mistaken shooting," the court determined that a "reasonable jury could find that [the officer's] mistake was unreasonable." *Id.* That was not because the historical facts were disputed per se, but because, "instead of finding that the circumstances forced [the officer] to make a split-second judgment about firing a weapon, a reasonable jury could conclude that her own poor judgment and lack of preparedness caused her to act with undue haste." *Id.* at 1126–27; *see* Pet. 12–13 (citing four other Ninth Circuit cases that hold similarly).

The respondents simply ignore these holdings. They focus instead on the fact that, in many of these cases, the court *also* held that there was a material dispute as to the historical facts. *See* BIO 16, 18. But the reasonableness of a mistake of fact is a different analytical question—and one that these courts have made clear is for the jury.

Finally, the respondents try to make something of the fact that the circuits in the majority often grant summary judgment to officers who made a mistake of fact. *See* BIO 14–18. But these cases don't show that courts "assess the objective reasonableness of mistakes." *Contra* BIO 14. Rather, as the petition emphasizes (at 19), they show that summary judgment may be warranted if no rational juror could find that the factual mistake was unreasonable, just as summary judgment may be warranted in any other case with no genuine dispute of fact. *See, e.g.*, *Lamont v. New Jersey*, 637 F.3d 177, 183–85 (3d Cir. 2011) (finding a genuine dispute as to the reasonableness of an officer's mistaken belief that a suspect was armed only for part of

the time that the officer used deadly force). And even in cases where the officer's mistake was unreasonable, the officer will remain protected by the doctrine of qualified immunity if he did not violate clearly established law. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

II. Amici confirm—and the respondents do not dispute—that a uniform rule is essential.

This division of authority is unacceptable. Although the respondents dispute the existence of the split, they do not deny that the proper allocation of decision-making power between judge and jury presents a matter of great constitutional significance. And it is one that should not be allowed to turn on geography. As the Cato Institute's amicus brief underscores (at 9), the right to a jury trial is a "safeguard against oppression" that is "central to the constitutional design of our justice system and to § 1983." And as Professor Stoughton's brief explains (at 4), "a multi-member jury is intrinsically better at diffusing the biases that frequently contaminate excessive-force cases—both in favor and against the officer." "Preserving the jury's role," then, "is essential to both the integrity of the judicial process and the legitimacy of law enforcement in a free society." Br. of Cato Institute at 9.

Far from rebutting these points, the respondents all but concede that the petition presents a question that is "foundational" to both "Fourth Amendment and qualified immunity jurisprudence." BIO 7. For that reason, too, certiorari on the first question is warranted.

III. The respondents' vehicle arguments misrepresent the decision below.

Unable to disprove the circuit split or diminish its importance, the respondents try to undermine this case as a vehicle. They make three arguments. None succeed.

The respondents first assert (at 11) that this case is an "exceedingly poor vehicle" to address the first question presented because, "[l]ike the Eighth Circuit, this Court would not need to reach the issue." BIO 11. But the Eighth Circuit *did* reach the issue, as did the district court. Both courts squarely rejected Officer Green's argument that the reasonableness of an officer's mistaken perception "is a question of fact for the jury" and instead held that it was for a court at summary judgment. App. 14a; *see* App. 38a–39a. It is *that* holding that the petition asks this Court to review. And it is clearly presented.

Next, the respondents suggest (at 11) that this case involves no mistake of fact *at all*. Of course it does. *See* Pet. 1. The respondents themselves contend (at 4) that Officer Tanner used deadly force because he "reasonably perceived that the subject was pointing a nickel-plated gun directly at him"—even though Green *wasn't* pointing a gun directly at him (or at anyone). So the case turns on whether Tanner's asserted mistaken "perce[ption]" was "reasonabl[e]," and, more to the point for purposes of this petition, whether a judge or jury decides that question.

Finally, the respondents claim (at 11) that answering the question would be "fact-intensive" and offer limited guidance for other cases. This, too, misperceives the actual question presented. If the Court were to grant review as to the first question, it would decide only the legal issue of whether a judge or jury has the authority to determine the objective reasonableness of an officer's mistake of fact in excessive-force cases. It would not have to then apply that answer to the circumstances of this case. Nor would it otherwise have to referee any factual disputes between the parties. Thus, far from being "intensely-fact bound," BIO 1, the question presented is purely legal.

IV. The respondents' merits arguments only reinforce the need for review.

On the merits, the respondents likewise fail to address the petition's key points. As the petition explains (at 1), Tanner testified that he used deadly force because he perceived Green to be a dangerous criminal fleeing the police, and because Green was pointing a gun at him, staring at him, and defying orders to drop the gun. The record, however, belies each of these claims. *See* Pet. 4–7. Determining whether Tanner's use of force was justified, then, turns on whether these mistakes were objectively reasonable. And that question is heavily intertwined with the jury's determination of what the facts actually are, and whether he is telling the truth—that is, did Tanner *in fact* perceive Green to be pointing a gun at him and defying repeated orders? Or is that a post-hoc justification offered by Tanner for having "act[ed] with undue haste"? *Torres*, 648 F.3d at 1126. Answering those questions requires a factfinder to evaluate testimony and assess credibility, both of which "are classic tasks for the jury, not the court." Br. of Cato Institute at 12.

The respondents also make no attempt to harmonize the decision below with *Tolan v. Cotton*, 572 U.S. 650 (2014). As the petition points out (at 18), *Tolan* vacated a grant of summary judgment to an officer because the lower court had usurped the jury's role in determining how a reasonable officer would have perceived the situation before him. *See id.* at 659. The decision below is incompatible with this case, just as it is incompatible with the common-law history, which the respondents also ignore, and which confirms that a jury decides whether an officer's mistaken perception was reasonable. *See* Pet. 18.

Instead of addressing any of these arguments, the respondents again fall back on two prosaic statements.

They repeat their refrain (at 11–12) that a court may decide the reasonableness of an officer's use of force where there is no genuine dispute of material fact. And they mischaracterize (at 7) the petition as advocating a rule that would preclude summary judgment in every case. But again, no one disputes the first point. *See* Pet. 10. As for the second, even if the reasonableness of a factual mistake is a jury question, summary judgment will remain permissible in many cases. *See* Pet. 19. In some cases, no reasonable jury could find that the officer's factual mistakes were unreasonable. But in other cases, like this one, a reasonable jury *could* make that finding, and summary judgment will be inappropriate. Because the Eighth Circuit did not ask that question, but instead decided the question for itself, this Court should grant plenary review on the first question presented and vacate.

V. If the Court does not grant plenary review, it should grant certiorari as to the second question, summarily vacate, and remand.

Even if the Eighth Circuit correctly held that the reasonableness of an officer's mistake of fact presents a question for a court, its answer to that question is plainly wrong. The Eighth Circuit answered the question based on facts concededly unknown to Tanner at the time. *See* App. 21a. And it leaned on a longstanding Eighth Circuit rule in doing so: "There is no constitutional . . . right that prevents an officer from using deadly force when faced with an apparently loaded weapon." App. 14a. Because these errors contravene *Barnes*, 605 U.S. at 73, this Court should at least vacate and remand. *See* Pet. 20.

The respondents proclaim (at 22) that *Barnes* "re-affirm[s] the wisdom" of the decision below. But they do not even try to defend the Eighth Circuit's "apparently loaded weapon" rule. *Cf. Barnes*, 605 U.S. at 80 (holding

that there is no "easy-to-apply legal test or on/off switch in this context"). Nor do they deny that this rule is "well-established in the Eighth Circuit" and "squarely governs" many cases. Pet. 24 (citing *Maser v. City of Coralville*, 2023 WL 8526724, at *11 (S.D. Iowa 2023)). And there is no doubt that the panel relied on facts concededly unknown to Tanner at the time. *Cf. Barnes*, 605 U.S. at 80 (explaining that the objective-reasonableness inquiry considers only facts "then known to the officer"). Indeed, the Eighth Circuit granted summary judgment to Tanner based on him "seeing a perceived suspect confronting officers with a gun in his hand," App. 15a—even though it recognized that "[t]here is no evidence Officer Tanner saw Officer Green approach officers," App. 13a, and that Tanner had in fact conceded that he could not see them. *See* App. 6a. That, too, directly contradicts *Barnes*.

CONCLUSION

This Court should grant the petition. It should either set the case for briefing and argument, or it should summarily vacate the Eighth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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