

No. 22-564

IN THE

Supreme Court of the United States

JUAN CARLOS SALAZAR,

Petitioner,

v.

JUAN RENE MOLINA,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF THE CATO INSTITUTE AND THE
RUTHERFORD INSTITUTE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTI-
TUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Avenue, N.W.
Washington, D.C. 20001
(202) 216-1461
jschweikert@cato.org

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QUESTION PRESENTED

After initially fleeing from police who suspected him of speeding, petitioner encountered a roadblock, pulled his car over, exited, and lay face down on the ground with hands outstretched. Respondent then approached petitioner and tased him in the back.

Under *Graham v. Connor*, the reasonableness of force depends on the circumstances an officer faced, including the crime at issue, whether the suspect poses an immediate threat, and whether he is actively resisting or evading arrest. 490 U.S. 386, 396 (1989). The district court denied respondent's summary judgment motion, citing disputes about the surrender that precluded qualified immunity. On interlocutory appeal, the Fifth Circuit reversed, holding that petitioner's high-speed initial flight, alone, permitted respondent to doubt the sincerity of petitioner's subsequent surrender and that the tasing was therefore a reasonable use of force.

The Fifth Circuit's past-flight-forfeits-surrender rule conflicts with Sixth and Seventh Circuit precedent holding that officers must identify aspects of a surrender suggesting it is fake and not assume so based on past flight alone. The question presented is:

Whether a suspect's dangerous past flight, without more, authorizes officers to doubt the sincerity of a subsequent surrender, as the Fifth Circuit holds, or whether courts must evaluate the reasonableness of force based on the actual features of the surrender itself and the circumstances an officer faces at the time force is used, as the Sixth and Seventh Circuits require?

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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, founded in 1999, focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

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.

Amici are concerned about the deleterious effect of the Fifth Circuit's rule on the power of citizens to vindicate their constitutional rights and the subse-

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

quent erosion of accountability among law-enforcement officials that the rule encourages.

SUMMARY OF ARGUMENT

In recent years, public trust in our government institutions has fallen to record lows. Our law-enforcement officers in particular face a crisis of confidence. As law-enforcement agencies and the courts have failed to address highly publicized police shootings and other instances of misconduct, officers have reported serious concern about their ability to safely perform their duties without the support and trust of the communities they serve.

The public demands accountability from law-enforcement officers, and law-enforcement officers deserve clear, objective standards governing their conduct. The rule applied below provides neither, resulting in less accountability for officers accused of misconduct and undermining public safety by discouraging suspects from complying with lawful police commands. This robs police misconduct victims of the relief they are entitled to and robs officers of the public trust necessary for effective community policing.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court explained that whether an officer used excessive force under the Fourth Amendment is determined by evaluating whether the officer's actions were "objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 396. That evaluation in turn "requires careful attention to the facts and circumstances of each particular

case,” including the consideration of three distinction factors: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* This analytical framework constitutes the touchstone both for police training on excessive force and for judicial evaluation of civil-rights claims alleging Fourth Amendment violations.

The Fifth Circuit’s past-flight-forfeits-surrender rule is irreconcilable with *Graham v. Connor*. Rather than conducting a particularized analysis of the *Graham* factors in this specific case, the court instead announced a general rule that “when a suspect has put officers and bystanders in harm’s way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect’s purported surrender is a ploy.” Pet. App. 7a. As petitioner explains, this presumption of reasonableness distorts two of the three *Graham* factors by using past behavior as a substitute for assessing whether the suspect poses an *immediate* threat and is *actively* resisting or evading arrest. Pet. at 22–28. Moreover, in addition to contradicting this Court’s precedent, the Fifth Circuit’s decision also creates a stark circuit split with the Sixth and Seventh Circuits. *Id.* at 15–21.

Amici will not discuss these doctrinal arguments in further detail but instead write separately to explain how the Fifth Circuit’s rule is bad for police and bad for the communities they serve. It immunizes certain police misconduct from liability, denying justice to victims. At the same time, it exacerbates

an existing crisis of confidence between law enforcement and the public, and in so doing harms law-enforcement officers themselves. This Court should grant the petition and return uniformity and predictability to the Court's Fourth Amendment jurisprudence.

ARGUMENT

I. The Fifth Circuit's Rule Denies Justice to Victims of Police Misconduct.

The decision below departs from this Court's precedent and will accelerate an already troubling trend: the public's loss of trust in law enforcement and other government institutions. As instances of police misconduct increasingly dominate the headlines, the rule adopted below stands to shield law-enforcement officers from accountability and deny relief to victims of misconduct. That result further undermines the people's already flagging trust. This Court should correct the Fifth Circuit's flawed interpretation of Fourth Amendment law.

A. Police Misconduct Is a Pressing Public Concern.

Public trust in law enforcement has fallen to record lows, in large part because of public concern about police misconduct. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020).² Although most law-enforcement officers never use lethal force, see Gene Demby, *Some Key Facts We've Learned About Police*

² Available at <https://tinyurl.com/wy33n5uh>.

Shootings Over the Past Year, NPR (Apr. 13, 2015),³ the minority that engage in fatal confrontations generate a staggering number of fatalities. Since 2015, officers have shot and killed at least 8,124 people, averaging over 1,000 people per year. Jennifer Jenkins et al., *Fatal Force*, Wash. Post Database (last updated Jan. 11, 2023).⁴ In the last year alone, officers fatally shot at least 1,101 people. *Id.* Just as staggeringly, law-enforcement officers injure tens of thousands of people every year. From 2006 to 2012, researchers found that approximately 51,000 people per year were injured in encounters with police. Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).⁵

Though this volume of officer-involved shootings and injuries is not a new phenomenon, new technology has allowed the public to document and publicize these incidents like never before. Michael Wines et al., *Police Killings Rise Slightly, Though Increased Focus May Suggest Otherwise*, N.Y. TIMES (Apr. 30, 2015).⁶

In particular, cell-phone cameras have captured compelling videos of numerous officer-involved shootings or their aftermaths.

A livestreamed cell-phone video captured the aftermath when a Minnesota police officer shot a mo-

³ Available at <https://tinyurl.com/wq82ob7>.

⁴ Available at <https://tinyurl.com/2s3jdfhx>.

⁵ Available at <https://tinyurl.com/tqjvb3n>.

⁶ Available at <https://tinyurl.com/ycnfo4xh>.

torist during a routine traffic stop after the motorist alerted the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YouTube (July 7, 2016).⁷ Another cell-phone video captured footage of two Baton Rouge police officers shooting a father of five after they had pinned him to the ground. ABC News, *Alton Sterling Shooting Cellphone Video*, YouTube (July 6, 2016).⁸ A cell-phone camera recorded a Pittsburgh police officer shooting an unarmed teenager who ran when police stopped a vehicle they believed was connected to another shooting. Guardian News, *Black Unarmed Teen Antwon Rose Shot In Pittsburgh*, YouTube (June 28, 2018).⁹ A bystander captured video of a Charleston officer shooting a man eight times in the back as he fled from a traffic stop. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YouTube (Apr. 7, 2015).¹⁰ And of course, Darnella Frazier recorded the cellphone video of the murder of George Floyd at the hands of Minneapolis police officers. Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier captured George Floyd's death on her cellphone. The teenager's video shaped the Chauvin trial.*, N.Y. TIMES (Apr. 20, 2021).¹¹

⁷ Available at <https://tinyurl.com/vmq4suy>.

⁸ Available at <https://tinyurl.com/v3vbaow>.

⁹ Available at <https://tinyurl.com/s2ygaps>.

¹⁰ Available at <https://tinyurl.com/qyklvsf>.

¹¹ Available at <https://tinyurl.com/msuwf425>.

These five videos alone have been viewed millions of times on YouTube. And similar videos recorded by officer body cameras have attracted similar attention on social-media platforms. See L.A. Times, *Body-Cam Video Of Daniel Shaver Shooting*, YouTube (Dec. 8, 2017);¹² N.Y. Times, *How Stephon Clark Was Killed by the Police*, YouTube (June 7, 2018).¹³

Although these and similar videos have led to increased public and media scrutiny of police misconduct,¹⁴ they have not led to meaningful increases in accountability for law-enforcement officers who engage in misconduct. Law-enforcement agencies seldom impose internal disciplinary measures. Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015);¹⁵ U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 83 (Mar. 4, 2015) (“Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.”).¹⁶ Prosecutors rarely bring criminal charges against officers, and they successfully convict officers even less frequently. From 2005 to 2015, only 54 officers were criminally charged in connection with any of the thousands of fatal shootings that occurred in those years; fewer than half were ultimately convicted. Kimberly Kindy & Kim-

¹² Available at <https://tinyurl.com/y8e9qm3l>.

¹³ Available at <https://tinyurl.com/wadopzk>.

¹⁴ Wines, *supra* n.6.

¹⁵ Available at <https://tinyurl.com/y3sr98m4>.

¹⁶ Available at <https://tinyurl.com/uvf2qdp>.

briell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015).¹⁷

B. The Fifth Circuit’s Rule Prevents Victims of Police Misconduct from Obtaining Redress.

The rule applied below undermines the efficacy of civil remedies—one of the few ways to hold police accountable for misconduct—by insulating a variety of misconduct from judicial review.

Section 1983 claims help “hold public officials accountable when they exercise power irresponsibly,” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), by providing a “damages remedy to protect the rights of citizens” who have been deprived of their federally guaranteed rights, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Relief under Section 1983 flows from the deprivation of an individual’s constitutional rights. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Here and in other cases where a plaintiff alleges that a law-enforcement officer used excessive force, the threshold issue is whether the officer’s conduct was objectively reasonable “in light of the facts and circumstances confronting them.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). This Court has clarified that courts must give “careful attention to the facts and circumstances of *each particular case*, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively

¹⁷ Available at <https://tinyurl.com/sdvvk8b>.

resisting arrest or attempting to evade arrest by flight.” *Id.* at 396 (emphasis added).

The decision below turns this principle of contextual analysis on its head. By holding that it is inherently “reasonable” for officers to doubt the sincerity of a surrender after a suspect has previously fled, the Fifth Circuit’s decision effectively authorizes lower courts to ignore the *particular* facts of any given case. Thus, as petitioner explains, the decision creates a “less-protective tier of Fourth Amendment rights for suspects who initially flee before surrendering.” Pet. at 22.

The extent to which this rule will deny a remedy to victims of police misconduct is exacerbated by the doctrine of qualified immunity. Under contemporary qualified immunity precedent, a civil rights plaintiff suing under Section 1983 must show both that the defendant caused the deprivation of “rights, privileges, or immunities secured by the Constitution and laws,” 42 U.S.C. § 1983, and that such rights were “clearly established at the time an action occurred.” *Harlow*, 457 U.S. at 818. This Court has further instructed lower courts “not to define clearly established law at a high level of generality,” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that “clearly established law must be ‘particularized’ to the facts of the case,” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In its recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), the Court clarified that the qualified-immunity inquiry ultimately turns on whether a public official had “fair notice” that their acts were

unlawful, and that a “general constitutional rule” identified in prior cases provides fair warning when it applies with “obvious clarity to the specific conduct in question.” *Id.* at 53–54. Thus, lower courts should avoid granting immunity merely because there is no prior judicial decision with functionally identical facts.

Nevertheless, especially in the context of excessive force, lower courts continue to require a high-degree of factual similarity before denying immunity to police officers. *See, e.g. O’Doan v. Sanford*, 991 F.3d 1027, 1044 (9th Cir. 2021) (“As we have explained, the ‘obviousness principle, an exception to the specific-case requirement, is especially problematic in the Fourth-Amendment context.” (quoting *Sharp v. City of Orange*, 871 F.3d 901, 912 (9th Cir. 2017))); *Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 991–92 (7th Cir. 2021) (the “obviousness” principle will rarely apply in situations that are “fast-moving,” “unpredictable,” and “volatile”).

Whether or not such decisions are correct applications of *Taylor v. Riojas*—and whether or not the doctrine of qualified immunity should itself be reconsidered¹⁸—they reflect the reality that Section 1983 plaintiffs will have an extraordinarily difficult time overcoming qualified immunity in Fourth Amendment cases without clear doctrinal guidance from

¹⁸ *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) (“I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.”).

this Court. Correcting the Fifth Circuit’s mistaken application of *Graham* is therefore not just a matter of protecting the Fourth Amendment rights of people within that circuit; instead, addressing the circuit split is necessary to ensure that Fourth Amendment rights are not denied nationwide simply because those rights were not “clearly established.”

Section 1983 serves as a vital bulwark against official wrongdoing, *see Pearson*, 555 U.S. at 231, particularly in the context of law enforcement misconduct, where other avenues for accountability are all too often ineffective or ignored. The Fifth Circuit’s rule undermines Section 1983’s central purpose by shielding officers from accountability and subjecting a certain class of suspects to a lower tier of Fourth Amendment protection. This Court should restore uniformity among the circuits on this important issue and empower courts to enforce accountability for public officials as contemplated by Section 1983.

II. The Fifth Circuit’s Rule Harms Law Enforcement by Eroding Public Trust.

Public trust is a law-enforcement officer’s most powerful currency, and it is critical to allowing officers to safely and effectively perform their duties. *See Inst. on Race and Justice, Northeastern Univ., Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008) (“Being viewed as fair and just is critical to successful policing in a democracy.”).¹⁹ If the public does not trust the police or perceives the police as unfair, “it will undermine their effective-

¹⁹ Available at <https://tinyurl.com/y3tqws78>.

ness.” *Id.*; accord Fred. O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018) (“When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.”); *Investigation of the Ferguson Police Department* at 80 (A “loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.”).

Not surprisingly, then, officers have overwhelmingly reported increased concern about their safety and additional difficulties in performing their duties because of lost public trust following recent highly publicized police shootings. Rich Morin, et al., *Behind the Badge*, PEW RESEARCH CTR. 65, 80 (2017) (more than 90% of officers reported that their colleagues were increasingly concerned about their safety and more than 85% reported increased difficulties in performing their duties).²⁰

Given the importance of public trust to effective policing, it makes sense that law-enforcement officers strongly support measures that foster a perception of fairness in the community. *See id.* at 72 (majority of respondents agree “that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public”). Officers also recognize that their colleagues who engage in misconduct are all too of-

²⁰ Available at <https://tinyurl.com/tujyxxv>.

ten not held to account. *See id.* at 40 (72% of respondents disagreed that “officers who consistently do a poor job are held accountable”). Knowing that more must be done to increase transparency and accountability, officers have looked to technology—such as body cameras—*id.* at 68, and, more importantly, to enacting clear standards that would promote accountability, *id.* at 40.

Thus, by holding police officers to a lower standard of accountability than this Court’s precedents permit—and by effectively allowing unnecessary violence against suspects that have previously fled—the Fifth Circuit’s decision harms both police officers and the victims of police misconduct. So long as liability—and accountability—fall short of constitutional standards, public trust in law enforcement will continue to dwindle, and officers’ ability to effectively and safely carry out their vital jobs will suffer.

CONCLUSION

For the foregoing reasons and those set forth by the petitioner, the Court should grant the petition.

Respectfully submitted,

John W. Whitehead	Clark M. Neily III
William E. Winters	Jay R. Schweikert
THE RUTHERFORD	<i>Counsel of Record</i>
INSTITUTE	CATO INSTITUTE
109 Deerwood Road	1000 Mass. Avenue, N.W.
Charlottesville, VA 22911	Washington, D.C. 20001
(434) 978-3888	(202) 216-1461
legal@rutherford.org	jschweikert@cato.org

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