No. 21-414

In The
Supreme Court of the United States

FIRST MIDWEST BANK, as Guardian of the Estate of Michael D. LaPorta,

Petitioner,

v.

CITY OF CHICAGO, ILLINOIS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* BLACK COPS AGAINST POLICE BRUTALITY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Black Cops Against Police Brutality (B-CAP) is a grassroots civic organization dedicated to being the conscience of the American criminal justice system. B-CAP seeks to improve the relationship between the police and the community and to safeguard the basic constitutional rights of every citizen against police abuse—especially for those living in urban America. In this regard, B-CAP is particularly concerned with government liability for police misconduct and racial unfairness in the administration of justice.

Dr. De Lacy Davis founded B-CAP in 1991.[2] For 20 years, Dr. Davis was a New Jersey police sergeant with the East Orange Police Department. Dr. Davis received twelve police commendations and led the Community Services Unit. Following his retirement, Dr. Davis completed his doctoral degree, researching the factors that cause police to shoot unarmed black males. Based on his research and professional experience, Dr. Davis realized that police reform cannot succeed unless such reform is both community-centered and pursued at every level of law enforcement.

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[1] This amicus brief is filed with the consent of Petitioner and Respondent after timely notice to both. *See* S. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part; nor has any person or entity, other than Black Cops Against Police Brutality and its counsel, contributed money intended to fund the preparation or submission of this brief.

[2] *See* De Lacy Davis, *From the Field: Why I Founded Black Cops Against Police Brutality*, J. OF ETHNICITY IN CRIM. J. (ONLINE), Sept. 24, 2021, https://bit.ly/3laWVhl.

B-CAP's advocacy carries forward these ideas. B-CAP's police-officer members have participated in community protests and negotiated police reforms on behalf of victims of police brutality. B-CAP has also provided sensitivity training to police departments and educational workshops to the public on what to do when stopped by the police. Finally, B-CAP has testified before legislative bodies and supported legal actions seeking to hold government accountable for police abuses. *See*, *e.g.*, Brief of *Amicus Curiae* B-CAP in Support of Respondents, *Pottawattamie Cnty., Iowa v. McGhee*, No. 08-1065 (U.S. filed Sep. 18, 2009).

SUMMARY OF THE ARGUMENT

The "grievous" nature of Michael LaPorta's case is undeniable. App-2. While off duty, Officer Patrick Kelly drew his service weapon and shot LaPorta in the head "at the end of a night of drinking together." *Id.* LaPorta survived, but he is now "severely and permanently disabled" because of a shocking act of police brutality—an attack presaged by Kelly's commission of two earlier off-duty drunken assaults against other persons, neither of which resulted in municipal disciplinary action. Pet. 6–7.

Recognizing the egregious nature of LaPorta's injuries—and the core lack of municipal discipline that let these injuries occur—a Chicago jury awarded $44.7 million in damages to LaPorta. Pet. 10. The jury agreed with LaPorta that the police department's failure "to

maintain an adequate early warning system" and "to adequately investigate and discipline officers" allowed Kelly to retain his service weapon and ultimately shoot LaPorta. App-8.

The Seventh Circuit reversed, concluding the jury could not hold a municipality liable on such "novel" theories. App-2. In the panel's view, the municipal failures found by the jury were irrelevant because "Kelly's actions were those of a private citizen in the course of a purely private social interaction." App-13. But this conclusion defies almost two centuries of history, which teaches the exact opposite lesson about modern policing.

Since the advent of the first organized police force in the 1830s, municipalities have recognized that effective policing depends on public trust. Municipalities have therefore long regulated and disciplined officers for private conduct that erodes public trust, including off-duty abuse of service weapons. Courts have then rejected officer appeals based on the argument that officers may not be disciplined for their private social interactions while off duty.

Against this backdrop, the LaPorta jury did nothing novel. It enforced time-honored principles that are the bedrock of every police department in America. Public trust in the police depends on fidelity to these principles as does police efficacy. The Court should grant review to reinforce these principles, ensuring the police remain accountable to the people.

ARGUMENT

Municipalities are liable for off-duty police conduct that involves preventable abuse of a service weapon and erodes public trust.

The origins of the modern police department go back to 1829 and Sir Robert Peel—"the father of London's police force"[3] and two-time British Prime Minister.[4] In advocating "the value of a formal police force," Peel had to face "the people's skepticism about . . . quasi-military power that could threaten liberty if unchecked."[5] What followed was the articulation of nine principles governing "every new officer."[6]

Peel's Principles instructed police officers that "[t]he ability of the police to perform their duties is dependent upon public approval of police actions."[7] By seeking "the willing cooperation of the public in voluntary observance of the law," officers would be able

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[3] Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2230 & n.25 (2017).

[4] A failed attempt to kill Peel while he was prime minister led to the famous M'Naghten test for insanity defenses. *See State v. Johnson*, 399 A.2d 469, 472 (R.I. 1979) ("Daniel M'Naghten attempted to assassinate Sir Robert Peel . . . but mistakenly shot Peel's private secretary instead.").

[5] Adegbile, *supra* note 3, at 2229.

[6] *Id.* at 2230. Scholars dispute whether Peel stated these principles himself, with some arguing "they were formulated in 1829 by the two first commissioners of London's Metropolitan Police Department." *Sir Robert Peel's Nine Principles of Policing*, N.Y. TIMES, Apr. 15, 2014, https://nyti.ms/3uHqCdb.

[7] *Peel's Nine Principles*, *supra* note 6 (Principle 2).

"to secure and maintain" the public's respect.[8] Officers were therefore obligated "**at all times**" to "maintain a relationship with the public that gives reality to the historic tradition that **the police are the public** and **the public are the police**."[9]

American police departments assimilated these lessons. Brooklyn (N.Y.) police regulations in 1893 required officers "in their conduct and deportment" to be "on all occasions . . . civil and orderly."[10] This meant refraining "at all times . . . from harsh, violent, coarse and profane language"[11] and answering public inquiries "with all possible attention and courtesy."[12] Officers could "use their clubs" only "in self-defense"; to rebuff "violent resistance to them in the discharge of their duty"; and in similar "urgent circumstances."[13] Otherwise, police leadership expected "[c]oolness and firmness" of "every officer in all cases."[14]

Hard consequences awaited officers who broke these rules (thereby eroding public trust)—especially if the violation stemmed from public intoxication. Brooklyn regulations dictated the suspension of "any

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[8] *Peel's Nine Principles*, *supra* note 6 (Principle 3).

[9] *Id.* (Principle 7) (bold added).

[10] RULES & REGULATIONS FOR THE GOVERNMENT OF THE POLICE FORCE OF THE CITY OF BROOKLYN 37 (1893).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

member of the police force . . . found intoxicated or unable to perform duty."[15] And if the officer at issue also proved "violent, disorderly, or unable to take care of himself," he was to "be detained as a prisoner, and taken before a [court] magistrate."[16]

Through these rules, police departments made clear their responsibility for their officers' actions at all times, even when off-duty. Courts then enforced these rules with vigor. In the 1877 case of *People ex rel. Connolly v. Board of Police Commissioners*, a New York court affirmed the removal of a New York City patrolman for off-duty misconduct (attempted sexual advantage of a minor).[17] The officer argued that his misconduct could not justify removal as he was not "at that time in uniform and on actual duty."[18]

The court disagreed: the municipality (through its police board) had "the power and . . . the duty" to "dismiss an officer who is guilty of criminal or immoral conduct when off duty as an unfit person to be a member of the force."[19] The municipality's

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[15] *Id.* at 38.

[16] *Id.*

[17] Reported in: 18 MARCUS HUN, REPORTS OF CASES HEARD AND DETERMINED IN THE SUPREME COURT OF THE STATE OF NEW YORK 403–05 (1877), https://bit.ly/3BlZ13S.

[18] *Id.* at 405.

[19] *Id.*

"jurisdiction" over its officers was "not limited to acts committed by policemen while on actual duty."[20]

The court finally noted the significant danger of excusing an officer's misconduct because the officer was "out of uniform" and "not in the actual discharge of official duty."[21] "Under such a rule, the force might be made up of drunkards who were careful to keep sober in uniform; or criminals or public brawlers with sufficient caution to avoid committing thefts or acts of violence while on actual duty."[22]

Connolly is no outlier. In the 1887 case of *People ex rel. Hayes v. Carroll*,[23] a New York court affirmed the removal of a Brooklyn patrolman who committed an assault on his "day off" while "he was not in uniform."[24] The officer argued that the municipality could not fire him "for his conduct when off duty."[25] The court rejected this defense, observing the police department's "rule" that "no policeman shall willfully abuse or ill-treat a citizen."[26] The court then stressed that an officer "must not be a brawler and fighter either when on or off duty, for his efficiency depends upon a public

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Reported in: 42 MARCUS HUN, REPORTS OF CASES HEARD AND DETERMINED IN THE SUPREME COURT OF THE STATE OF NEW YORK 438–40 (1887), https://bit.ly/3iBadls.

[24] *Id.* at 439.

[25] *Id.*

[26] *Id.*

respect for his office and a confidence in the acts and deportment of the officer."[27]

Another New York court of the same era was even more blunt: "[t]he idea that a citizen is compelled to ask protection against the lawless acts of a sworn protector of the public peace 'loaded with rum' is almost too revolting to be credited." *People ex rel. Minchen v. McLean*, 21 N.Y.S. 625, 626 (N.Y. Superior Ct. 1893). The court declared that the officer at issue "should have been arrested then and there, and consigned to prison for his offences." *Id.* at 626–27. "This officer, clothed in the dignity of his office, representing in theory 'law and order,' should have been an exemplar of all that was orderly." *Id.*

The *Minchen* court also recognized that off-duty police misconduct—and municipal failures to address it—threatened police efficacy as much as the public trust. Even when an officer was "nominally off duty," he was still "liable to be called upon by his superior officers whenever the exigencies of the department required his services." *Id.* Such "police discipline" was not possible, however, so long as off-duty officers were (for example) free to wander "the public streets and in public places in a state of inebriety." *Id.*

Being off-duty also was no excuse for an officer's conscious disregard of police duty. A New York court in 1890 affirmed the removal of a Brooklyn patrolman

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[27] *Id.*

who, while off-duty, "failed to arrest" a person "who committed an assault in [the officer's] presence" and then escaped. *People ex rel. Robinson v. Bell*, 8 N.Y.S. 748, 748 (N.Y. Supreme Ct. 1890). The court found it was "no excuse" that the officer "was 'off duty.'" *Id.* "Taking off his uniform did not divest him of his powers as a police officer." *Id.*

Connecticut's high court voiced the same view in 1884 to reject the idea that police officers, while off-duty, could use their discovery of felonies to claim private rewards. *See In re Application of Russell*, 51 Conn. 577, 594 (1884). The court explained that officers are "bound, without other compensation or reward than that given by the law, to communicate" information within their jurisdiction enabling "the conviction of perpetrators of crime." *Id.* The court also noted that "[t]o withhold such information would be a flagrant breach of duty" justifying removal. *Id.*

In sum: American police departments have long understood that "[f]rom the time" a police officer "is given his shield" to the day "he resigns it," the officer "is really never off duty"—"once a policeman, always a policeman."[28] "Sleeping or waking, on duty or off," an officer "never rids himself of his office as policeman and is never free from the rules of the department and the supervision of his commanding officers."[29] On this indispensable foundation rests the "special

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[28] A. E. COSTELLO, HISTORY OF THE POLICE DEPARTMENT OF JERSEY CITY 365 (1891).

[29] *Id.*

relationship between the community policed and a policeman." *Detroit Police Officers Ass'n v. City of Detroit*, 385 Mich. 519, 522–23 (1971).

To then ensure that officers are "immediately prepared to perform their duties" no matter "where they are or what they are doing," most jurisdictions require officers "to be armed at all times." *Id.*; *see also*, *e.g.*, *EEOC v. New Jersey*, 620 F. Supp. 977, 984–85 (D.N.J. 1985) (observing that all New Jersey state police officers are required both "to be 'on call' 24 hours a day" and "to carry a service weapon at all times"); *Timus v. United States*, 406 A.2d 1269, 1275 (D.C. 1979) (explaining under D.C. law, special police officers are issued a service revolver and "required to possess the pistol while [they are] off duty").

By the same token—and consistent with Peel's Principles—American police departments have made clear their responsibility for their officers' handling of service weapons at all times, even while off-duty. Department regulations often require special boards of inquiry "to review the circumstances surrounding each discharge" of a police firearm and "unauthorized use of a service weapon by an officer or any other person." *Gonzales v. Tucson*, 604 P.2d 1161, 1163 (Ariz. Ct. App. 1979). Departments may even impose proactive restrictions on an officer's possession of his service weapon in certain risky situations. *See*, *e.g.*, *Miller v. New Jersey*, 144 F. App'x 926, 927–28 (3d Cir. 2005) (detailing New Jersey Attorney General guidelines that prohibit officers involved in a domestic violence

incident "from carrying any weapon while off-duty" pending an internal investigation).

Most importantly, police departments review off-duty police shootings. For example, when officer James Hairston "shot and killed Adam Tyree Boyd" while Hairston was "working at his off-duty job," the D.C. Metropolitan Police Department undertook "a two-step administrative investigation to ensure conformance with MPD regulations." *Hairston v. D.C.*, 638 F. Supp. 198, 199, 201 (D.D.C. 1986). The results of this investigation were then referable to a "Use of Service Weapon Review Board (USWRB) for a recommendation of whether adverse action should be taken." *Id.* at 201. The USWRB found Hairston's off-duty shooting of Boyd "was unjustified." *Id.*

Courts have then upheld police department findings of service-weapon abuse (and discipline) against officers asserting the defense that they were off-duty. In *Doerr v. Commonwealth*, a liquor-control-board officer "became embroiled in a heated argument" with a relative that "escalated into physical violence." 491 A.2d 299, 301 (Pa. Commw. Ct. 1985). The officer "lost possession and control of her service revolver," leading to a formal suspension and later termination. *Id.* at 301, 304. The officer appealed, insisting that the incident was "nothing more than a private domestic dispute" that "did not occur during her duty hours." *Id.* at 302.

The court rejected this analysis: "an incident need not occur during an employee's tour of duty . . . to

constitute 'just cause' warranting removal." *Id.* The court had to consider the incident's "destructive impact on public respect for the police service." *Id.* at 303. The court observed that the officer "had been drinking beer for several hours in a bar" before the incident; she "sought the confrontation"; she then "[lost] control of her weapon"; and, as a result, she was "unable to participate" in a later police raid "to which she was assigned." *Id.* The court thus found it "clear" that the incident eroded public trust. *Id.*

The same erosion of public trust occurs when municipalities neglect preventable service-weapon abuses, especially abuses during off-duty time.[30] "[A] municipality has a plain duty of care in its supervision of those whom it arms." *Corridon v. Bayonne*, 324 A.2d 42, 44 (N.J. Superior Ct. 1974). Thus, police departments must provide "adequate training and experience in the . . . use of weapons." *Id.* But this is not all: departments must also identify and redress situations "unreasonably increasing the already great hazard" that service weapons pose. *Id.* One such situation is service weapons remaining in the hands of

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[30] The prevalence of off-duty service-weapon use (and abuse) is nothing new or surprising. A January 1995 article in *New York* magazine reported New York transit cops had already that month "shot four people while off duty, zero people while on duty." Manny Howard, *Halt, Off-Duty Police!*, N.Y. MAG., Jan. 23, 1995, at 14, https://bit.ly/3oHLyjn. The article also quoted a police lieutenant's "perfectly good explanation" for this phenomenon: "You're off duty twice as much as you're on. A tour is only eight hours. That leaves sixteen hours off duty and officers are expected to uphold the duty *all* the time." *Id.* (italics in original).

"deranged police officers." *Gibson v. Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990).

For this reason, courts have found "police departments liable"—or allowed lawsuits to proceed—based on off-duty assaults "against members of the general public" enabled by the "use of . . . service revolvers." *Mendoza v. City of Los Angeles*, 78 Cal. Rptr. 2d 525, 529 (Cal. Ct. App. 1998) (collecting cases); *cf. Bonsignore v. New York*, 683 F.2d 635, 638 (2d Cir. 1982) ("The City could reasonably have anticipated that its negligence in failing to identify officers . . . unfit to carry guns would result in an unfit officer injuring someone using the gun he was required to carry.").

Consider *Marusa v. D.C.*, 484 F.2d 828 (D.C. Cir. 1973). After having "consumed an excessive amount of liquor in a bar," D.C. Officer Delbert Clark drew his service revolver and shot Duane Marusa. *Id.* at 830. The D.C. Circuit revived Marusa's common-law claims. *Id.* The court found "[t]he fact that Officer Clark was out of uniform at the time of the alleged assault on Marusa [did] not affect [its] conclusion." *Id.*

Indeed, "Officer Clark's tort was made possible only through the use of his service revolver, which he carried by [D.C.] authority." *Id.* The municipality "not only authorized but required" officers to "carry their service revolvers . . . 'at all times' . . . whether in or out of uniform." *Id.* The municipality then had "a duty to minimize the risk of injury . . . presented by this policy." *Id.* And if a D.C. police officer later "misuse[d]

his weapon" during his off-duty hours (as Officer Clark did), a "judge or jury might reasonably find that [officer] misuse to have been proximately caused by the government's negligence." *Id.*

It follows that when a jury finds exactly this—as the jury in Michael LaPorta's case did—they are not doing anything "novel." App-2. They are "giv[ing] reality to the historic tradition that the police are the public and the public are the police."[31] Under this tradition, a police officer "must not be a brawler and fighter either when on or off duty, for his efficiency depends upon a public respect for his office."[32] And as new acts of police brutality continue to emerge, this tradition matters now more than ever.[33]

CONCLUSION

The "very essence of civil liberty" is "the right of every individual to claim the protection of the laws" when "he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Michael LaPorta sought to vindicate that right here, and, by extension, the right of every Chicago resident to a police department that is accountable to the people. In holding against LaPorta, the Seventh Circuit lost sight of these

[31] *Peel's Nine Principles*, *supra* note 6 (Principle 7).

[32] HUN, *supra* note 23, at 439.

[33] *See*, *e.g.*, 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/3koIumX.

principles, blinded by a shortsighted view of municipal liability. The Court should grant review and reverse.

Respectfully submitted,

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