

No. 22-564

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IN THE  
**Supreme Court of the United States**

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JUAN CARLOS SALAZAR,  
*Petitioner,*

v.

JUAN RENE MOLINA,  
*Respondent.*

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

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**BRIEF OF AMICUS CURIAE  
LAW ENFORCEMENT ACTION PARTNERSHIP  
IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Law Enforcement Action Partnership (“LEAP”) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials who advocate for criminal-justice and drug-policy reforms to make our communities safer and more just. LEAP was founded by five police officers in 2002. Today, it coordinates advocacy and speaking events by over 200 criminal-justice professionals who advise on police–community relations, incarceration, harm reduction, and drug policy, among other issues. Through speaking engagements, media appearances, testimony, and advice to government agencies and policymakers, LEAP helps to produce practical and ethical law-enforcement policies. LEAP shares an interest in the sound and consistent development of Fourth Amendment jurisprudence, especially when the development would promote government accountability and transparency.

**SUMMARY OF ARGUMENT**

Longstanding Fourth Amendment doctrine requires courts to look to a law-enforcement officer’s then-present circumstances when evaluating whether an exercise of force against an individual was reasonable. Both the Sixth and Seventh Circuits have

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for LEAP states that no counsel for a party authored this brief in whole or in part, and that no person other than LEAP or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this amicus brief pursuant to Supreme Court Rule 37.2. LEAP submits this brief on behalf of itself alone. This brief does not purport to represent the view or position of any person or institution other than LEAP.

consequently held that an individual's prior flight does not alone vitiate their Fourth Amendment protections from unreasonable force—prior flight is instead just one of a number of factors to be assessed.

In this case, the Fifth Circuit held otherwise, concluding that an individual's past, high-speed evasion of police is alone sufficient for law-enforcement officers to doubt the sincerity of the individual's surrender. Alternatively stated, the Fifth Circuit held that—under the Constitution—a law-enforcement officer is conclusively presumed to have acted reasonably in exercising force against an individual who initially fled but has since chosen to surrender.

That holding is an aberration in Fourth Amendment doctrine. If left in place, it will have a deleterious impact on the relationship between law-enforcement officers and the communities that they serve and protect. To reestablish uniformity in Fourth Amendment jurisprudence, this Court should grant certiorari and reverse the Fifth Circuit's ruling.

### **ARGUMENT**

#### **I. The decision below creates a circuit split warranting this Court's review.**

This Court has instructed lower courts to determine whether force used during a seizure was reasonable by giving “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 [the suspect] is actively

resisting arrest or attempting to evade arrest by flight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Consistent with that principle, the Sixth and Seventh Circuits look to all the circumstances of an attempted surrender in assessing whether law-enforcement officers reasonably resorted to the use of force during those surrenders. Such an assessment is required given that the “gratuitous use of force against a suspect who has ‘surrendered’ is ‘excessive as a matter of law.’” *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (quoting *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006)). And “that’s the case even when the suspect had originally resisted arrest,” including by “running from the police.” *Id.*

Because the “prohibition against significant force against a subdued suspect applies notwithstanding the suspect’s previous behavior,” *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014), both the Sixth and Seventh Circuits have refused to adopt a rule that permits officers to ignore an individual’s surrender if the individual had previously fled from authorities, *see, e.g., id.*; *Tapp v. Banks*, 1 F. App’x 344, 346 (6th Cir. 2001) (denying qualified immunity because a reasonable juror could find that the suspect, who “suddenly decided to ‘surrender’ after giving up the chase,” was subjected to excessive force, even though “some suspects fake their surrenders”). Of course, officers may bear in mind that a “surrender is not always genuine”; but a rule that categorically permits the use of force against individuals who initially flee would render surrender “futile as a means to de-escalate a confrontation with law enforcement.” *Alicea v. Thomas*, 815 F.3d 282, 288–89 (7th Cir. 2016). Both Circuits have therefore held that “[t]he



sole fact a suspect has resisted arrest cannot justify disregarding his surrender in deciding whether and how to use force.” *Id.* at 289; *accord Ortiz*, 811 F.3d at 852 (holding the same in the Sixth Circuit).

The Fifth Circuit, in contrast, has adopted a categorical rule that permits law-enforcement officers to use force against a surrendering individual whenever the surrender was preceded by flight: “[W]hen 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 play.” Pet. App. at 7a. In the view of the Fifth Circuit, “a suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place.” Pet. App. 8a.

The Fifth Circuit’s categorical rule stands contrary to this Court’s instruction that courts evaluating the reasonableness of uses of force give “careful attention to the facts and circumstances of each particular case, including . . . whether suspect poses an *immediate* threat to the safety of the officers or others, and whether [the suspect] is *actively* resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. Moreover, it creates a direct conflict with the holdings of the Sixth and Seventh Circuits. If that conflict goes unaddressed by this Court, all citizens’ Fourth Amendment protections will expand or contract depending on whether they are traveling through Kentucky, Michigan, Ohio, Tennessee, Illinois, Wisconsin, and Indiana on the one hand, and Texas, Louisiana, and

Mississippi on the other. The Fifth Circuit’s decision therefore warrants review and reversal by this Court.

## **II. The Fifth Circuit’s rule will undermine the public’s confidence in law enforcement.**

Granting blanket immunity to police officers who exercise force against surrendering suspects—even those who had previously fled—hurts the law-enforcement community itself. It reinforces the public’s perception that police are held to a far lower standard of accountability than ordinary citizens.

In the aftermath of many high-profile police killings—most obviously, the murder of George Floyd at the hands of Minnesota police in 2020—Gallup reported that trust in police officers had reached a twenty-seven-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html>. For the first time ever, fewer than half of Americans place confidence in their police force. *Id.*

This drop in confidence has been driven in large part by videos of high-profile police killings of unarmed suspects and the public’s perception that officers who commit such misconduct are rarely held accountable for their actions. Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of ‘I Can’t Breathe.’*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>. Indeed, according to a recent survey of more than 8,000 police officers themselves, 72 percent disagreed with the statement that “officers who consistently do a poor job are held accountable.”

Rich Morin et al., PEW RESEARCH CTR. (2017), *Behind the Badge* at 40, <https://pewrsr.ch/2z2gGSn>.

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. “Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness.” INST. ON RACE & JUSTICE, NORTHEASTERN UNIV., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/promoting-cooperative-strategies-reduce-racial-profiling>.

In other words, “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.” Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2282, 2356 (2018); accord U.S. DEPT OF JUSTICE, *Investigation of the Ferguson Police Department* at 80 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (“[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.”).

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, “[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.” INST. ON RACE AND JUSTICE, *supra*, at 21. A legal system that ensures law-enforcement officers consider then-existing circumstances when deciding whether and how to exercise force will assist the law-enforcement community in overcoming negative perceptions about policing. It will, moreover, withhold judicial imprimatur from the conduct of a minority of police who routinely break the law and thereby erode relationships between the public and law enforcement.

In a recent survey, nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. PEW RESEARCH CTR., *supra*, at 65. Eighty-six percent agreed that their jobs have become more difficult as a result. *Id.* at 80. Many see improved community relations as a solution, and more than half agreed “that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public.” *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability; for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—holding wrongdoing officers more accountable for their actions, *id.* at 40.

By reversing the Fifth Circuit and clarifying that prior flight does not give law-enforcement officers a blank check to use force against surrendering

individuals, the Court can take a significant step toward restoring public confidence in police officers.

### CONCLUSION

This Court should grant the petition for certiorari to review the split in the circuits below and reverse the Fifth Circuit's categorical rule that the Fourth Amendment permits the use of force on a surrendering suspect who has previously fled from law enforcement.

Respectfully submitted,

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