

COLORADO SUPREME COURT

2 East 14th Avenue
Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals
Case No. 24CA0079
Opinion of October 2, 2025
Division IV, per Judge Meirink
Gomez and Bernard, JJ., concur

Appeal from Arapahoe County District Court
Honorable Elizabeth Beebe Volz, Judge
Case No. 2022CV31471

Petitioner:

BRENDAN DAVES, Aurora Police Department
Officer,

v.

Respondent:

CHRISTOPHER MOSLEY.

Counsel for Amici CIRSA
SGR, LLC
Eric M. Ziporin
James T. Kadolph
3900 E. Mexico Ave, Suite 700
Denver, Colorado 800210
(303) 320-0509
eziporin@sgrllc.com
jkadolph@sgrllc.com

Counsel for Amici CAPP
Nathan Dumm & Mayer, P.C.
J. Andrew Nathan
Timothy M. Walsh

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7900 E. Union Ave, Suite 600 Denver, Colorado 80237 (303) 691-3737 anathan@ndm-law.com twalsh@ndm-law.com	
AMICUS BRIEF IN SUPPORT OF PETITIONER BRENDAN DAVES	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that this brief complies with C.A.R. 29(d) because it contains 3,336. words.

By: /s/ Eric M. Ziporin
Eric M. Ziporin, #30133
James T. Kadolph #56813
Attorneys for CIRSA, Amici

By: /s/ J. Andrew Nathan
J. Andrew Nathan, #3295
Timothy M. Walsh, # 60124
Attorneys for CAPP, Amici

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Amici Colorado Intergovernmental Risk Sharing Agency (“CIRSA”) and Colorado Counties Casualty and Property Pool (“CAPP”) appear by its undersigned attorneys in support of the Petitioner Brandan Daves and submit this brief as follows.

I. INTEREST OF THE *AMICI CURIAE*

Amici, represented by the undersigned above, are two entities that provide liability insurance coverage to public entities that employ peace officers who are qualified defendants under C.R.S. § 13-21-131.

A. CIRSA

CIRSA is a Colorado public entity self-insurance pool providing property, liability, and workers’ compensation coverages throughout the State of Colorado. Formed in 1982 by 18 municipalities, CIRSA now serves 299 member municipalities and affiliated legal entities. CIRSA is not an insurance company, but an entity created by intergovernmental agreement of its public entity members as provided for by C.R.S. § 24-10-115.5. In addition to various coverages and associated risk management services, CIRSA provides its members publications, training, and consultation services. Member cities and towns govern CIRSA and support it through financial contributions. The contributions paid by CIRSA’s public entity members pay for covered claims against the members and their officers and employees. The contributions are also used to buy certain excess insurance or

reinsurance coverage. CIRSA provides liability coverage for 149 member police departments, employing approximately 3,980 full-time and 182 part-time or reserve peace officers. Whenever peace officers employed by CIRSA members are sued under C.R.S. § 13-21-131, CIRSA provides coverage and legal defense for such claims, subject to certain exclusions. Many of CIRSA's members employ peace officers who could be qualified defendants under that statute.

B. CAPP

CAPP was formed in 1986 through an Intergovernmental Agreement and now consists of 50 counties in the State of Colorado. CAPP provides for its public entity members various coverages through itself and through excess carriers with whom it contracts. CAPP further provides its members training and publications which are called "Education Through Technical Updates." The members of CAPP support it through financial contributions. Most of the members of CAPP employ peace officers. The members employ over 1500 deputy sheriffs, as well as other officers. If a peace officer employed by a member is sued under the Law Enforcement Integrity Act ("LEIA"), CAPP provides coverage and a legal defense for such claims, subject to certain exclusions. CAPP therefore has an interest in cases filed under LEIA.

II. SUMMARY OF THE ARGUMENT

The Court of Appeals held that a police officer has the burden to prove that they properly conducted a protective sweep of a car during a traffic stop. The holding is flawed because the Court of Appeals reached it without considering the protective sweep doctrine's unique, pragmatic foundation grounded in the profound occupational risks faced by police officers. Statistical evidence shows that those concerns which informed the creation of the doctrine are still present.

Moreover, the Court of Appeals' holding creates a perverse incentive that encourages the filing of frivolous or unmeritorious lawsuits, while providing no material procedural benefit to claimants with meritorious claims. Moreover, it serves to create a unique and possibly very large amendment to how claims under § 13-21-131 are litigated, without any corresponding change to the language of the statute or involvement from the General Assembly. Those changes – including shifting the burden in perhaps most cases brought under the state constitution – create a problematic risk environment that the Court of Appeals did not consider.

III. ARGUMENT

A. The Court of Appeals' Holding Failed to Consider the Unique Nature of the Protective Sweep Doctrine and Did Not Consider the Pragmatic Consequences of Its Holding.

The Supreme Court's recognition of the protective sweep doctrine is relatively unique. *See Michigan v. Long*, 463 U.S. 1032, 1047-1052 (1983). Rather than being

rooted in the history, tradition, or custom of the founders or the text of the Fourth Amendment, it is instead purely pragmatic and tied to the particular risk that police officers and deputies take when approaching a car. *Id.* In *Pennsylvania v. Mimms*, the Supreme Court observed: “We have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.” 434 U.S. 106, 110 (1977). The Supreme Court utilized statistical studies in recognizing this doctrine. *Id.* Moreover: “[i]t appears ‘that a significant percentage of murders of police officers occurs when the officers are making traffic stops.’” *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 234 (1973)). This pragmatic approach is consistent through the Supreme Court’s cases on this doctrine. *See Long*, 463 U.S. 1048 (“Again, our decision rested in part on our view of the danger presented to police officers in ‘traffic stop’ and automobile situations.”) (citing *Adams v. Williams*, 407 U.S. 143 (1972)). Moreover, a traffic stop “takes place when the officer is particularly vulnerable.” *Long*, 463 U.S. at 1052. This Court has adopted that same pragmatic rationale: “the purpose of a protective search is to neutralize threats to officer safety.” *People v. Delacruz*, 2016 CO 76, ¶ 21; *See also People v. Melgosa*, 753 P.2d 221, 225-226 (Colo. 1988); *People v. Brant*, 252 P.3d 459, 462-63 (Colo. 2011).

The Court of Appeals' opinion does not address these pragmatic concerns, which are particularly sharp in this state. In this state's courts – unlike in federal court or in the courts of forty-six other states – qualified immunity is not a defense to claims under § 13-21-131. *See* COLO.REV.STAT. § 13-21-131(2)(b). Instead, the Court of Appeals anchored its holding on: (1) the fact that government has the burden of persuasion and production on this issue in criminal cases; and (2) that some federal courts apply different Fourth Amendment doctrines the way that the Court of Appeals held. Neither basis grapples with the unique basis for the protective sweep doctrine and the possible impact of the Court of Appeals' holding.

The fact that the prosecution in a criminal case has the burden to prove the applicability of the doctrine at trial is of no matter to these concerns. While a peace officer may have a well-natured interest in the outcome of a criminal case the officer has initiated – e.g., a successful prosecution may validate the officer's judgment, preserve the officer's credibility and professional reputation, and advance the officer's law-enforcement objectives – the officer ordinarily has no direct personal or financial stake in its outcome. The same is not true for a civil action, where peace officers face the specter of monetary damages. *See* Colo.Rev.Stat. § 13-21-131(4)(a). The prospect of damages already deters officers from conducting protective sweeps. Placing the burden of proving the doctrine on the defendant

officer in a civil action is therefore unnecessary to deter unconstitutional conduct and would instead risk discouraging lawful protective sweeps undertaken to protect officers and the public.

The federal cases cited by the Court of Appeals are not concerned with protective sweeps – and thus did not consider how such a holding would impact the officers applying the protective sweep doctrine on a daily basis. *Mascorro v. Billings* is concerned with the exigent circumstances exception to the Fourth Amendment’s warrant requirement. 656 F.3d 1198, 1205 (10th Cir. 2011). The same is true of *Armijo v. Peterson* – while the case discusses the protective sweep doctrine in relation to a house, the language cited refers to the exigent circumstances exception to the warrant requirement. 601 F.3d 1065, 1070 (10th Cir. 2010). The cases from other jurisdictions largely have the same defect – they do not clearly discuss the unique doctrine at issue in this case or concern searches of homes. *See Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d. Cir. 1996); *Hardesty v. Hamburg Township*, 461 F.3d 646, 655 (6th Cir. 2006); *Hopkins v. Boncicino*, 573 F.3d 752, 764 (9th Cir. 2009).

Because the protective sweep doctrine is a prophylactic measure intended to balance the substantial risk to law enforcement with the constitutional rights of all, the Court of Appeals should have considered the risks inherent to shifting the burden of proving the doctrine to a civil defendant. By increasing officers’ legal exposure

when they conduct protective sweeps, the Court of Appeals’ decision may deter officers from taking reasonable protective measures, thus compounding the substantial risks officers already face in conducting traffic stops. Amici address both issues in turn.

1. Litigation Consequences in Colorado Courts.

The Court of Appeals’ holding that the protective sweep doctrine is an affirmative defense has outsized influence on how similar cases – both frivolous and meritorious – may be litigated. When a case is received, the first decision made by defense counsel is whether to file an answer or a motion to dismiss. But in general, an affirmative defense may only be raised in an answer, not a motion to dismiss. *See Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 2018 COA 107, ¶ 13. There are exceptions to this rule, such as if a plaintiff alleges facts demonstrating the applicability of the affirmative defense in the complaint itself. *Id.* at ¶ 14. But even this posture is more restrictive than before, as a Court cannot take judicial notice of documents in deciding a motion to dismiss predicated on an affirmative defense. *Id.* at ¶ 15.

The Court of Appeals’ holding does not meaningfully change the decision to file a motion to dismiss or an answer for meritorious claims, which – taken as true – would allege sufficient facts to state a claim for relief. But it does meaningfully

change the calculus for unmeritorious or frivolous claims. Previously, an unmeritorious or frivolous claim could be disposed of before the cost of discovery could be incurred by attaching documents that a district court could take judicial notice of or were public records. This includes genuine court documents from another court’s docket and body worn camera footage, where appropriate under this Court’s precedent. See *Peña v. Am. Family Mut. Ins. Co.*, 463 P.3d 879, 881 (Colo. App. 2018) (recognizing that a court may take judicial notice of public records); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011) (describing “public record”); COLO.REV.STAT § 24-31-902(1)(a)(II)(A) (mandating video recording of police encounters).

Under the Court of Appeals’ holding, this practice is no longer a viable way to move to dismiss frivolous claims at an early stage before litigation costs spike in discovery. This is because a reviewing court’s review is confined to the “bare allegations of the complaint.” *Prospect Dev. Co.*, 2018 COA 107, ¶ 14. Conversely, the Court of Appeals’ holding has no utility in allowing meritorious claims to proceed – those claims would have already plausibly alleged a constitutional violation regardless of whether a protective sweep was an affirmative defense or not.

As it relates to drafting complaints, the Court of Appeals’ holding invites abuse. As it stands, a Plaintiff will only need to allege the following facts: (1) that a

search of their vehicle occurred; and (2) that the search was warrantless. *See id.* (finding that a plaintiff does not need to anticipate an affirmative defense and plead facts intended to negate it). Under the Court of Appeals’ holding, those two facts are sufficient to plausibly allege a violation of the Fourth Amendment, and any justification for why a search occurred without a warrant – including a protective sweep – would be an affirmative defense. Again, this holding has no meaningful effect on the litigation of meritorious claims, as they already survived the relatively low bar of a C.R.C.P. 12(b)(5) motion. But it significantly increases the value and appeal of filing unmeritorious or frivolous claims by not needing to allege any additional facts to survive a Motion to Dismiss.¹ The effect of the Court of Appeals’ holding is that almost all instances where a search is conducted without a warrant will create circumstances that plausibly allege a constitutional violation.

And that result is unintended, based on the plain text of § 13-21-131. As insurers of municipalities, counties, and their peace officers, Amici have a clear interest in addressing frivolous or unmeritorious litigation at the earliest possible

¹ Indeed, the Court of Appeals’ holding invites a plaintiff to allege *fewer* facts, which runs counter to Rule 8’s goal of informing a Defendant of the nature of the claim against them. It draws closer to formulaically reciting the elements of a claim – which *Warne v. Hall* expressly rejected. 2016 CO 50, ¶ 27.

stage. Absent reversal from this Court, the consequences of the Court of Appeals' holding will be significant.

2. The Data Underlying the Protective Sweep Doctrine.

As explained above, the protective sweep doctrine was created in part because of the “particular hazards confronting law enforcement during roadside encounters with drivers and passengers of automobiles.” *People v. Baker*, 2026 CO 41, ¶ 18. The empirical evidence for the extent of that risk should be considered in determining which party bears the ultimate burden of persuasion on this issue in lawsuits brought under § 13-21-131.

Traffic stops are one of the most common interactions between a police officer and the public. See Michelle Rippey, *Education, (re)training, and traffic stops: Felonious law enforcement officer deaths in the United States*, International Journal of Law, Crime and Justice 72, 2 (2023). Between 1990 and 2021, at least 125 officers were feloniously killed during traffic stops. *Id.* at 5. Despite a general downward trend, recent years have resulted in an uptick in felonious killings of officers. *Id.* at 2. This is in spite of a clear link between body armor use and survivability. *Id.* at 10. The significant majority of deaths that occurred (88%) were during traffic stops where an officer did not conduct a “felony stop” predicated on

the prior awareness of danger. *Id.* at 5. 87.9% of killings occurred because of gunfire. *Id.*

Subsequent research contains data of when these killings occur during an interaction. See Summer Jackson & Michelle Rippy, *When Police Officers Are Killed: Profile of Fatal Felonious Law Enforcement Traffic Stop Encounters in the United States*, American Journal of Criminal Justice Vol. 49 (2024). This study found that the majority of these killings (57%) occurred during the traffic stop – when a police officer could have performed a protective sweep. *Id.* at 107. The data confirms that the local law enforcement officers employed by members of the Amici’s public entity self-insurance pools are largely the ones at risk. *Id.* at 112. The authors of the study emphasize the importance of rulings that increase the safety of these encounters. *Id.* at 113.

3. Conclusion.

As summarized above, the protective sweep doctrine is unique because it is informed by practical considerations – namely the violent risk to life that police officers face when stopping a vehicle. This is particularly true in the majority of cases where an arrest is not made and “the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle[.]” *Arizona v. Gant*, 556 U.S. 332, 352 (2009) (Scalia, J., concurring) (cited

with approval in *People v. Delacruz*, 2016 CO 76, ¶ 20). Those concerns remain present to this day, as evidenced by analyses of the data behind those killings. The Court of Appeals’ holding does not address this unique underpinning of the protective sweep doctrine – it instead treats it as a standard exception to the warrant requirement.

Those concerns should have been considered by the Court of Appeals when it held that the justification of a protective sweep is an affirmative defense. In doing so, the Court of Appeals necessarily disincentivized the use of protective sweeps, which will make conducting traffic stops more dangerous both during the stop and afterwards.

Beyond this, the Court of Appeals’ holding makes defending search and seizure cases substantially more burdensome on municipal and county entities, defendant officers, and their insurers. Because of the framing of the protective sweep doctrine as an affirmative defense, frivolous and non-meritorious claims reap a windfall by the Court of Appeals’ holding. The Court of Appeals should be reversed.

B. THE COURT OF APPEALS’ HOLDING REPRESENTS A SIGNIFICANT CHANGE IN THE LAW.

The General Assembly’s intent in crafting § 13-21-131 was largely to recreate the framework of 42 U.S.C. § 1983, with one notable exception – the desire to eliminate qualified immunity. *Compare* 42 U.S.C. § 1983 *with* COLO.REV.STAT. §

13-21-131(1) (textually nearly identical). But the Court of Appeals’ holding would modify this delicate balance without any input from the General Assembly. This is because the rationale underlying the Court of Appeals’ holding ultimately leads to the conclusion that law enforcement justifications for conduct are purely affirmative defenses that the civil defendant bears the burden to prove by a preponderance of the evidence.

In fact, the Court of Appeals’ rationale irresistibly questions whether probable cause or a reasonable use of force is an affirmative defense. *See Mosley v. Daves*, 2025 COA 80, ¶ 18. In doing so, the Court of Appeals cited to state tort law cases. But the General Assembly explicitly made § 13-21-131 a remedy distinct from state tort law. *See* COLO.REV.STAT. § 13-21-131(2)(a) (carving out the Colorado Governmental Immunity Act from applying to actions under this section); § 24-10-106(1) (applying to all tort claims asserted against government entities). Nor is the Constitution a font of tort law, where tort concepts are readily applicable. *See Henderson v. Gunther*, 931 P.2d 1150, 1155 (Colo. 1997) (“The constitutional guarantee of due process does not convert all common law duties owed by government actors into constitutional torts.”); *see also Daniels v. Williams*, 474 U.S. 327, 332 (1986) (“Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying

down rules of conduct to regulate liability for injuries that attend living together in society.”).

The Court of Appeals’ approach would represent a change in the law that would prove to be greater than the effect the authorizing statute had. If – as the Court of Appeals implies – a legal justification for a police officer’s conduct constitutes an affirmative defense, then police officers will ultimately bear the burden of persuasion in most civil cases they must defend. For false arrest cases, malicious prosecution, and retaliation cases, a police officer would likely bear the burden of demonstrating that the legal justification of probable cause applies. For search and seizure cases (like this one), the police officer will bear the burden of demonstrating the applicability of the protective sweep doctrine or an exception to the warrant requirement.

In effect, the exception swallows the rule. The majority of cases brought under § 13-21-131 would become ones where the civil *defendant* has the ultimate burden of persuasion to the jury. This is particularly problematic given that § 13-21-131(3) (unlike state tort law claims) provides for a mandatory award of attorneys’ fees for any successful plaintiff. Thus, unlike in any other state or forum, Colorado peace officers would be particularly vulnerable to suit by bearing the burden of persuasion and having the threat of attorney’s fees raised against them.

As public entity self-insurance pools that provide coverages for entities that employ law enforcement officers, Amici have concerns that the natural outgrowth of the Court of Appeals' holding would have deleterious effects on their ability to provide coverage for their members. Logically, a situation where a party bears the burden of proving the ultimate facts at issue in most cases, *and* has decreased ability to obtain dismissal of unmeritorious or frivolous § 13-21-131 claims, *and* has the threat of significant mandatory attorneys' fees judgments is a substantially elevated risk environment. These are reasons enough to consider reversing the Court of Appeals on the issue presented to this Court.

IV. CONCLUSION

The Court of Appeals' holding flips the ordinary course of a civil lawsuit on its head for claims brought under § 13-21-131 – without any textual basis. It did so while conflating the protective sweep doctrine with garden variety exceptions to the warrant requirement. The protective sweep doctrine is not a standard exception to the warrant requirement; it exists to protect police officers and bystanders by making traffic stops safer through a narrow search of a limited space. The Court of Appeals' holding fails to consider the pragmatic basis of the doctrine and should be reversed as a result.

Respectfully submitted,

SGR, LLC

By: /s/ Eric M. Ziporin

Eric M. Ziporin, #30133

James T. Kadolph #56813

Attorneys for CIRSA, Amici

By: /s/ J. Andrew Nathan

J. Andrew Nathan, #3295

Timothy M. Walsh, # 60124

Attorneys for CAPP, Amici

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2026, a true and exact copy of the above and foregoing **AMICUS BRIEF IN SUPPORT OF PETITIONER BRENDAN DAVES** was electronically filed with the Court served on the following via Colorado Courts E-Filing:

OFFICE OF THE AURORA CITY ATTORNEY

Gillian Fahlsing

Aurora Municipal Center

15151 East Alameda Parkway, Suite 5300

Aurora, Colorado 80012

gfahlsin@auroragov.org

Counsel for Petitioner Daves

FRANK LAW OFFICE LLC

Adam Frank

1133 N. Pennsylvania Street

Denver, Colorado 80203

adam@franklawoffice.com

Counsel for Respondent

/s/ Laurie O'Neill

Legal Secretary