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Certiorari to the Court of Appeals, 2024CA79 District Court, Arapahoe County, 2022CV31471	
Petitioner: Brendan Daves, v. **Respondent:** Christopher Mosley.	
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BRIEF OF AMICI CURIAE COLORADO FRATERNAL ORDER OF POLICE STATE LODGE AND NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,132 words (amicus brief does not exceed one-half the maximum length for a principal brief, *i.e.*, 4,750 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

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IDENTITY OF THE AMICI CURIAE AND THEIR INTEREST IN THE CASE

Amicus Curiae Colorado Fraternal Order of Police State Lodge (the "Colorado FOP") is a professional police organization supporting Petitioner Brendan Daves' position on the issues announced by the Court. The Colorado FOP is the largest professional police organization in Colorado, and is dedicated to protecting and improving the rights and benefits of police officers. In Colorado, three out of four law enforcement officers are members of the Colorado FOP, and the Colorado FOP represents law enforcement officers at all levels of government and ranks. The Colorado FOP has over 10,000 members across Colorado in 67 local lodges, and it works tirelessly for Colorado's law enforcement officers and to enhance the communities they serve. The Colorado FOP has an interest in this case because of the impact the Court's ruling will have on Colorado's law enforcement officers and organizations who will be directly impacted by this Court's ruling and its application in the day-to-day duties of law enforcement officers, and the impact on the communities that these law enforcement officers risk their lives to protect.

Amicus Curiae National Fraternal Order of Police ("National FOP") is the largest law enforcement labor organization in the world, representing more than 378,000 sworn officers in over 2,200 lodges across the United States. It represents the officers who conduct traffic stops that turn dangerous without warning and who

must decide, in a matter of seconds, whether to take a protective measure to keep themselves and the public safe. This brief is not about whether Officer Daves made the right call during one traffic stop. The National FOP's interest is in the rule that will result from this Court's decision and in the officers who will have to work under it, not only in Colorado but in the growing number of jurisdictions that look to Colorado's lead. Those officers, and the public they protect, have a direct stake in how this Court resolves the question presented, and the National FOP submits this brief to speak to that interest.

ARGUMENT

Whether a defendant officer in an action under C.R.S. § 13-21-131 bears the burden of proving the constitutional validity of a protective sweep (*Terry* stop) of a vehicle or bears the burden of proving that as an affirmative defense, the negative public policy impacts will be the same. The practical effect of putting the burden of proof on the defendant—whether as an affirmative defense or otherwise—will be to disproportionately increase law enforcement officers' exposure to civil lawsuits to the detriment of the public, the officers, and the courts. Shifting the burden of proof to the defendant will also significantly increase the number of lawsuits filed in Colorado's state courts, which has a significant cost to officers, the courts, and the public irrespective of the outcome of those lawsuits. Because statutes similar to

C.R.S. § 13-21-131 have recently been enacted in other parts of the country, the Court's decision in this case will have nationwide implications. In short, shifting the burden of proof to defendant law enforcement officers in claims arising from *Terry* stops will have far-reaching negative effects, not the least of which being increasing the risk to the public and to the officers putting their lives on the line to protect their communities.

I. Shifting the burden of proof to the defendant will chill lawful protective sweeps, increasing the risk to the public and to officers in situations that are already potentially dangerous.

In cases addressing the constitutional validity of a protective sweep, the deciding issue will be whether the officer had reasonable suspicion under *Terry* to perform the protective sweep. Of the three types of police-citizen encounters, only two implicate the Fourth Amendment: investigatory stops and arrests. *People v. Morales*, 935 P.2d 936, 939 (Colo. 1997). The standard for investigatory stops is reasonable suspicion, while the standard for arrests is probable cause. *Id.*; *see also Terry v. Ohio*, 392 U.S. 1, 21 (1968). The "reasonable suspicion" standard defined by *Terry* has been extended to include protective sweeps of vehicles during a roadside stop. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). A protective sweep under *Terry* is by definition conducted without a warrant. *Id.* at 1049, n. 14. The constitutionality of a protective sweep rests solely on whether "the police officer

possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049 (quotation marks omitted). As in the case before this Court, the only material issue to be decided at trial will be reasonable suspicion.

The elements of Mr. Mosley's claim articulated by the trial court, and approved of by the Court of Appeals, were undisputed, leaving only the "affirmative defense" for the jury to decide. The elements were (1) Officer Daves was a "peace officer"; (2) he searched Mr. Mosley's vehicle while acting in that capacity; and (3) Officer Daves' didn't have a warrant for the search. *Mosley v. Daves*, 2025 COA 80, at ¶ 11. The disputed issue was whether the protective sweep was constitutionally permissible—*i.e.*, supported by reasonable suspicion. That issue was framed as an affirmative defense that Officer Daves bore the burden to prove. *Id.* Placing the burden on the officer thereby creates a legal framework where a plaintiff doesn't have to prove "the deprivation of any individual rights" in a C.R.S. § 13-21-131 action. Instead, the defendant must *disprove* it.

Assigning the burden of proof to the defendant for the only material issue in the case will make all claims based on protective sweeps easier for plaintiffs to win. Even in a defensible case, the allocation of the burden of proof combined with the

inherent uncertainty of trials will increase the risk for defendants and give these cases higher settlement value for plaintiffs. Moreover, increasing the ease with which a plaintiff can prevail will motivate plaintiffs and their counsel to more readily file such actions, even in dubious cases.

Civil liability is on the mind of most law enforcement officers while performing their duties, and it influences their decision-making. Daniel Hall et al., *A Study of Civil Liability Views of U.S. Midwestern Police*, Justice, Law, and Public Safety Studies Department Faculty Conferences (2024). A study of "de-policing"—a controversial term that, at minimum, reflects the pressures imposed on officers—"found that civil litigation was referenced 'almost universally' as a primary reason for the de-policing phenomenon." Derek Cataldo, *Duty and Liability: A Case for Preserving Qualified Immunity*, Harvard Kennedy School Student Policy Review (2024) (*quoting* Willard M. Oliver, *Depolicing: Rhetoric or Reality?*, 28 Criminal Justice Policy Review, 449, (2017)). Increased exposure to civil lawsuits and liability will cause officers to second-guess the need for a protective sweep even when a sweep is warranted. Reasonable officers will either delay conducting a sweep or forego it entirely. This can have tragic effects for the public and officers in the dangerous circumstances of roadside stops.

The most serious consequence of the rule under review is borne by officers, and the public, at the roadside. A protective sweep is a safety measure the law already permits: when an officer has a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons, the officer may perform a limited search to locate and secure weapons. The purpose is singular and protective—to ensure that a person the officer reasonably believes may be armed and dangerous cannot reach a weapon in a split second. In this case, a handgun was found in the center console of the vehicle.

The protective sweep decision is, and must be, made in real time. The officer must act on what is perceived in the moment, before the opportunity to act closes. A reviewing court, on the other hand, evaluates the same decision months later, on a full record, with slowed video and unhurried deliberation. The United States Supreme Court has long recognized that asymmetry, cautioning that an officer's judgments must not be assessed with the 20/20 vision of hindsight because officers are forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

A study of officer response times found that an officer confronting a complex threat requires, on average, roughly half a second to begin responding, while an armed subject can draw and fire in as little as a quarter of a second. W. Lewinski et al., *Ambushes Leading Cause of Officer Fatalities—When Every Second Counts*, 15 Law Enforcement Executive Forum 1, 2 (2015). Roadway stops, like the one here, are "especially fraught with danger to police officers." *Long*, 463 U.S. at 1047. Justice Kavanaugh recently catalogued those dangers: officers operate at a "tactical disadvantage" when approaching an unknown vehicle with "limited visibility and unpredictable threats"; a driver's failure to comply multiplies those risks; and "none of the options available to the officer avoids danger to the community"—all require "life-or-death decisions that must be made in a few seconds in highly stressful and unpredictable circumstances." *Barnes v. Felix,* 605 U.S. 73, 85-87 (2025) (Kavanaugh, J., concurring). This danger arises at least in part from a suspect's ability to access a weapon, even if the weapon isn't on their person. *Long*, 463 U.S. at 1048. Officers will often know little to nothing about the occupants of the vehicle. They're approaching the "unknown," and someone intent on harming the officer, whether to escape apprehension for more serious crimes or for other reasons, has a distinct tactical advantage. Peter Nickeas, Emma Tucker, *Multiple attacks on officers this week illustrate the inherent dangers of traffic stops*, CNN (Jan. 29,

2022), https://www.cnn.com/2022/01/28/us/traffic-stops-officers-attacked (last retrieved Aug. 22, 2026).

Vehicle stops can turn unexpectedly violent in the blink of an eye, and even the slightest hesitation in performing a protective sweep could be the difference between life and death. A protective sweep is not only for the sake of officer safety, but also for the sake of others. *See Long*, 463 U.S. at 1049 ("Our past cases indicate then that protection of police and others can justify protective searches…"). Officers performing vehicle stops must make critical decisions in the moment, and even the briefest hesitation can be enough for a suspect to get the jump on the officer.

If officers must later bear the burden of proving to a civil jury that their split-second safety decisions were reasonable, officers will understandably hesitate at future roadside stops and thereby endanger the public and themselves. An officer who must weigh, in a fraction of a second, not just the immediate risk but also the prospect of later bearing the burden of proving the decision was justified, will understandably be discouraged from engaging in the protective sweep in the first place. The result is not more careful policing. Instead, it is an officer who second-guesses looking for a weapon he reasonably believes may be within reach of a person whose intentions are unknown, and an encounter left more dangerous for the officer, the person stopped, and the bystander members of the public.

Shifting the burden of proof to the officers tells them that their decisions to perform protective sweeps are always wrong in civil lawsuits, unless they can overcome the burden of proof and the inherent uncertainty of trials. The inevitable chilling effect on officers performing protective sweeps is at the heart of the National and Colorado FOP's concern. A rule that makes officers hesitate to take appropriate protective steps intended to enhance safety doesn't serve the interests of the public, it contravenes it. Deterring lawful action that keeps the public and law enforcement officers safe is a cost our communities cannot and should not bear.

II. Shifting the burden of proof to defendant will substantially increase the number of lawsuits filed in Colorado state courts.

In addition to increasing law enforcement officers' exposure to civil liability, shifting the burden of proof to defendants will increase the sheer number of lawsuits filed in Colorado courts, to the detriment of the public, officers, and the court system. As noted, if defendants in § 13-21-131 actions arising from protective sweeps bear the burden of proof, nothing of substance will remain for plaintiffs to prove. As this case illustrates, whether the defendant was a "peace officer" and conducted a search under color of law without a warrant will be givens in these cases. Unfortunately, the practical reality is that such a low bar for plaintiffs will promote and encourage such lawsuits to be brought even on dubious facts, simply to recover nuisance value.

See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949) (discussing the opportunity for abuse of "strike suits" in shareholder derivative actions).

The number of lawsuits filed in Colorado arising from protective sweeps will also increase because qualified immunity was eliminated by C.R.S. § 13-21-131. That, combined with a rule shifting the burden of proof to the defendant, will cause plaintiffs who would otherwise file 42 U.S.C. § 1983 actions in federal court to instead file in state court under § 13-21-131. The inevitable increase in the number of lawsuits will add to the already burdened Colorado state court dockets and will take a significant toll on the law enforcement officer defendants.

Irrespective of the outcome of a lawsuit, the mere fact of being sued has a real and negative psychological impact. Michaela Keet, Heather Heavin, and Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 Windsor Y.B. Access Just. 73 (2017). The increased threat of litigation created by shifting the burden of proof to defendants will provide additional disincentive for officers to perform justified protective sweeps, exacerbating the danger to the public and the officers.

III. The rule this court announces will shape officer conduct across a growing body of state law.

The question this Court will decide—who bears the burden of proving or disproving the constitutional validity of an officer's protective sweep in a civil action

under C.R.S. § 13-21-131—will not remain confined to Colorado. Section 13-21-131 was the first statute of its kind, but other jurisdictions have since followed Colorado's lead. Because Colorado moved first, this Court's resolution of the burden question will be among the earliest and most influential authority available to the courts and legislatures that follow. The National Fraternal Order of Police writes to address that national dimension.

The core point is a practical one. In a jurisdiction that has abrogated qualified immunity, the burden of proof is not a mere procedural detail. It affects every officer deciding, in tense, uncertain moments, whether to take a lawful protective measure the law permits when reasonable suspicion exists, and it will do the same in every jurisdiction that adopts the same rule. An officer who must later shoulder the burden of proving that a split-second safety decision was reasonable, before a civil jury and without the protection of qualified immunity available in § 1983 actions, will weigh that prospect at the roadside. That calculus will soon reach other jurisdictions.

The removal of qualified immunity from state law claims is no longer an isolated Colorado experiment. Since 2020, jurisdictions across the country have moved to narrow or eliminate the defense for state law claims, through legislation, judicial decision, and municipal ordinance alike. These measures vary in mechanism

and reach, but they share a common trajectory, and Colorado's § 13-21-131 stands at its leading edge as the first and most complete example.

Colorado led with SB 217 in 2020, creating a state civil action for constitutional violations and barring qualified immunity as a defense. New Mexico followed in 2021 with the New Mexico Civil Rights Act, N.M. Stat. Ann. §§ 41-4A-1 to -13, eliminating qualified immunity as a defense to civil-rights claims under the New Mexico Constitution and capping damages per claim. These statutes are the closest analogues to the issue here, and the burden question this Court decides will bear most directly on litigation under them.

Other States have curtailed the defense without adopting Colorado's full model. Connecticut's 2020 Police Accountability Act, Conn. Gen. Stat. § 52-571k, permits suits against officers in state court for violations of state rights, but preserves a defense where the officer had an objectively good faith belief that the conduct was lawful, a standard narrower than the federal "clearly established" requirement. California, through SB 2 in 2021, removed certain immunities that had shielded officers under the State's Bane Act, but did not create a new state-level cause of action. Cal. Civ. Code § 52.1. Massachusetts, in its 2020 police-reform law, barred officers from invoking qualified immunity where their conduct results in decertification, ALM GL ch. 12, § 11H(b), while its legislature declined broader

repeal. And although state-level reform in New York has not succeeded, the New York City Council in 2021 enacted an ordinance permitting individuals to sue NYPD officers directly and effectively removing the defense for specified civil-rights claims within the city. N.Y.C., N.Y., ADMIN. CODE §§ 8-801 to 8-807 (2022). . These measures confirm the trend even where they stop short of Colorado's approach.

The trend is advancing through the courts as well as legislatures. In *Mack v. Williams*, 138 Nev. 854, 522 P.3d 434 (2022), the Nevada Supreme Court, sitting en banc, held that the search-and-seizure provision of the Nevada Constitution contains an implied private right of action for money damages, and that federal qualified immunity is not a defense to it. The court did not decide who bears the burden of justifying a warrantless search; that question was not before it. But *Mack* demonstrates that this development is advancing judicially as well as legislatively, and when Nevada's courts reach the burden question, they will look to the courts that reached it first. Colorado is poised to be among them.

Across at least half a dozen States, the District of Columbia, and the Nation's largest city—and through every branch and level of government—the qualified immunity safeguard is being withdrawn from state law claims arising from officers' split-second decisions. Colorado went first and went furthest. The rule this Court

announces on the allocation of the burden of proof will not stay in Colorado, and the National Fraternal Order of Police appears precisely because the officers it represents will police under the shadow of that rule across the country.

CONCLUSION

This Court should make clear that plaintiffs bear the burden of proving a deprivation of rights in an action brought under C.R.S. § 13-21-131, and reverse the decision of the Court of Appeals.

Respectfully submitted August 24, 2026.

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CERTIFICATE OF SERVICE

I certify that on August 24, 2026, I filed with the Colorado Supreme Court, and served on counsel of record, this brief via CCEF.

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