

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.

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Counsel for Petitioner

OFFICE OF THE AURORA CITY ATTORNEY
Gillian Fahlsing, #33201
Aurora Municipal Center
15151 East Alameda Parkway, Suite 5300
Aurora, Colorado 80012
(303) 739-7030
gfahlsin@auroragov.org

Case Number: **2025 SC 676**

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these Rules. Specifically, the undersigned certifies that this brief complies with the applicable word limit set forth C.A.R. 28(g). It contains 9,321 words, which is not more than the 9,500-word limit.

The undersigned acknowledges that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Gillian Fahlsing

Gillian Fahlsing
Counsel for Petitioner

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the plaintiff or defendant carries the burden of proving or disproving the constitutional validity of an officer's protective sweep of a vehicle in a civil case brought under C.R.S. § 13-21-131.

(2) Whether a police officer defendant in a civil case has the burden of proving legal justification for a protective sweep of a vehicle as an affirmative defense, which shifts the burden of proof.

II. STATEMENT OF THE CASE

A. Nature of the Case and Relevant Facts.

As depicted on body-worn camera ("BWC") video, at approximately 12:05 a.m. on April 25, 2021, police officer Brendan Daves pulled over Christopher Mosley in the vehicle he was driving for not displaying any license plates. [CF, pp. 47-48; 135; 141, 2:4-7; 240-241, ¶ 2.] Without any prompting from Daves, Mosley began volunteering information about where he had been, what he was doing, and where he was going. [CF, pp. 47-48; 135; 141, 2:8-21; 242, ¶ 6.]

Mosley stated he did not have any identification. [CF, pp. 47-48; 135; 141, 2:23, 3:2-3; 241, ¶ 5.] Mosley spelled his first and last name for Daves and provided his birth date. [CF, pp. 47-48; 135; 141, 4:1-8.] Daves asked Mosley to turn off the vehicle and hand him his keys. [CF, pp. 47-48; 135; 141, 3:11-13.] Daves asked

Mosley to exit the vehicle and asked him if he had “any weapons on [him] at all,” to which Mosley replied he did not. [CF, pp. 47-48; 135; 141, 5:20-25; 242, ¶ 6.]

Daves briefly patted down Mosley for weapons then asked him to sit on the bumper of his patrol car. [CF, pp. 47-48; 135; 142, 6:1-8; 242, ¶ 6.] Mosley stated he had just come from the mall where he had purchased the vehicle; the other party had taken the plates off the vehicle, given him the title, and told him, “yeah, man, you know, good luck pretty much.” [CF, pp. 47-48; 135; 142, 6:9-19; 242, ¶ 7.] Daves asked Mosley if he saw him pull behind Mosley’s vehicle and why he went three blocks after Daves activated his emergency lights, to which Mosley responded he could not find a place to park. [CF, pp. 47-48; 142, 6:24-7:11; 241, ¶ 3.]

Daves confirmed Mosley had chosen midnight to meet the other party for the exchange. [CF, pp. 47-48; 142, 7:12-16.] Daves asked again whether there were any guns in the vehicle, to which Mosley responded there were not because he had just purchased the vehicle. [CF, pp. 47-48; 135; 142, 7:18-24.] When Daves inquired about the female passenger in the vehicle, Mosley stated she was his girlfriend. [CF, pp. 47-48; 142, 8:24-9:1.]

Once Daves’s backup officer, Kenneth Preston, arrived at the scene, Daves ran the information provided by Mosley on his mobile computer in his patrol car. [CF, pp. 47-48; 135-136; 142, 9:8-14; 242, ¶¶ 6, 8-9.] Daves exited his patrol vehicle

and stated: “All right, Mr. Mosley, so we have a series of lies. . . . So why don’t you start unwrapping them for me.” [CF, pp. 47-48; 142, 9:15-19.] Mosley tried to explain that the last name of “Wooten” must appear on his identification. [CF, pp. 47-48; 142, 9:20-25; 143, 10:1-15; 243, ¶ 10.] Daves, then having reviewed Mosley’s criminal history, asked Mosley when he “kill[ed] [his] number,” referring to Mosley’s prior incarceration for a felony conviction. [CF, pp. 47-48; 136; 143, 10:16-23; 243, ¶ 10.]

Daves asked about the identity of the female who was riding in Mosley’s vehicle, and despite previously stating she was his girlfriend, Mosley responded he did not know her name. [CF, pp. 47-48; 143, 11:3-6.] Once the female passenger exited Mosley’s vehicle and sat on the curb, Daves directed “Wooten” (Mosley) to also sit on the curb so Officer Preston could watch both of them. [CF, pp. 47-48; 136; 143, 11:14-21, 12:12-13; 243, ¶ 11.]

Daves asked about the protection order between the two of them, to which Mosley denied any knowledge. [CF, pp. 47-48; 135-136; 143, 12:14-21; 242, ¶ 9; 243, ¶ 11.] Daves went back to his mobile computer in his patrol car to continue trying to obtain information about the two, and returned a few minutes later to advise about a protection order for “not creating new crimes between the two of [them].” [CF, pp. 47-48; 135-136; 143, 12:22-13:1; 242-243, ¶ 9; 243, ¶ 11.]

After first stating the female was his girlfriend, then stating he did not know her name, Mosley finally admitted he and the female had a child together. [CF, pp. 47-48; 143, 13:3-4; 243, ¶ 11.] Daves stated: “Like I said, series of lies, man. You’ve got to cut it out.” [CF, pp. 47-48; 143, 13:7-8.] Daves stated that at the time, his plan was to let Mosley go. [CF, p. 243, ¶ 12.] However, due to his observations, Mosley’s behavior, and the discrepancies, Daves decided to do a protective sweep of Mosley’s vehicle. [CF, pp. 47-48; 135-136; 241-244, ¶¶ 3-12.] He stated he was going to “check” Mosley’s car and asked if there were any “guns in there.” [CF, pp. 47-48; 143, 13:23-24.] Mosley responded: “Like I said, I don’t know. I just got the vehicle. That is the truth.. . .like I said, I haven’t even looked through the vehicle or anything.” [CF, pp. 47-48; 143, 13:25; 144, 14:1, 8-9; 243-244, ¶ 12.]

As depicted in the BWC video, Daves returned to Mosley’s vehicle, checked underneath the driver seat, between the seat and the center console, and then inside of the center console, which was not locked in any way. [CF, pp. 47-48; 136; 244, ¶ 13.] Inside the center console, Daves discovered a handgun, which was placed muzzle down (grip up), which would allow a person to have an immediate shooting grip. [CF, pp. 47-48; 136; 244, ¶ 13.] Daves returned to the curb area, handcuffed Mosley, told him he was under arrest for being in possession of a weapon while a felon, and placed him in a patrol car. [CF, pp. 47-48; 136-137; 244, ¶ 14.]

B. Procedural History.

Mosley filed his Complaint on August 5, 2022, alleging Daves searched his car “without legal basis, in violation of Mr. Mosley’s constitutional rights under the Colorado Constitution, article II, section seven.” [CF, p. 3, ¶ 1.] Mosley’s sole claim for relief is premised on an alleged unconstitutional search under C.R.S. § 13-21-131. [CF, p. 8, ¶¶ 65-75.] Daves filed an Answer and an Amended Answer to the Complaint denying the material allegations, and in neither instance did he assert the affirmative defense of “legal justification.” [CF, p. 27, ¶¶ 1-7; p. 115, ¶¶ 1-7.]

Prior to trial, the parties submitted competing jury instructions concerning liability and the applicable burden of proof. [CF, pp. 737-742, 745 (Plaintiff’s); pp. 753 (Defendant’s).] On the first day of trial, commencing on July 24, 2023, the Court advised it had determined that whether or not there was a justifiable or reasonable “protective search” or “whether that occurred to justify a search without a warrant” was “an affirmative defense that Defendant has the burden of proving.” [TR (7/24/23), p. 6:13-18.]

The Court acknowledged it did not “think the parties clarified to each other whether [the protective sweep] was or it wasn’t an affirmative defense.” [TR (7/24/23), p. 6:21-23.] Later that day, the Court stated: “The jury is going to be instructed that a warrantless search of a vehicle is presumptively unreasonable and

that only if there is an articulable, objectively reasonable reason for doing a warrantless search can...the search be still constitutional.” [TR (7/24/23), p. 197:11-16.]

At the jury instruction conference, defense counsel argued that the burden of proof rested with Mosley to show by a preponderance of the evidence that Daves did not have reasonable suspicion to conduct a protective sweep of the vehicle. [TR (7/25/23), pp. 252:12-22, 253:1-4, 254:2-255:17.] Counsel made further argument to the Court why the burden of proof rested with Mosley to prove the unreasonableness of Daves’s protective sweep, and that a “protective sweep” is not an exception to the warrant requirement. [TR (7/25/23), pp. 259:3-25, 260:23-263:18.]

After making a record of the law supporting Daves’s rejected proffered jury instructions, defense counsel stated: “if the Court is to rule that it is going to be Defendant’s burden, then we would move the Court to amend our answer to include that [affirmative defense].” [TR (7/25/23), p. 263:18-21.] The Court ruled as follows: “I am finding that it is an affirmative defense, but I am permitting the Defendant to amend [his] answer to allow [him] to make the argument that a protective sweep is an exception to the warrant requirement.” [TR (7/25/23), p. 263:22-25.]

The case was submitted to the jury on the third day of trial after the close of evidence. The Court read the jury instructions aloud to the jury. [TR (7/26/23), pp. 114:9-123:15.]

The final jury instructions at issue before this Court concerning the burden of proof and Daves's "affirmative defense" were as follows:

The parties to this case are: Christopher Mosley, the plaintiff and Brendan Daves, the defendant.

The plaintiff Christopher Mosley claims that on April 25, 2021, the defendant Brendan Daves, a police officer, violated Mr. Mosley's constitutional right to be free from unreasonable searches, by unjustifiably searching Mr. Mosley's automobile without a warrant.

The defendant, Brendan Daves, does not dispute that he is a police officer, nor does he dispute that he searched plaintiff's vehicle without a warrant. However, as an affirmative defense, defendant asserts that he was justified in conducting a protective sweep of the vehicle, an exception to the warrant requirement.

These are the issues you are to decide.

[CF, p. 778 (Instruction No. 1).]

For the plaintiff, Christopher Mosley, to recover from the defendant, Brendan Daves, on his claim of violation of a constitutional right, you must find that all of the following have been proved by a preponderance of the evidence:

1. Defendant Brendan Daves is a “Peace Officer.”
2. On or about April 25, 2021, Defendant Brendan Daves, acting in his capacity as a Peace Officer, searched Plaintiff Christopher Mosley’s vehicle.
3. At the time of the search Defendant Brendan Daves did not have a warrant for such search.

If you find that any one or more of these three statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these three statements have been proved, then you must consider the affirmative defense of an exception to the constitutional warrant requirement allowing for a “protective sweep” of a vehicle.

If you find that this affirmative defense has been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that this affirmative defense has not been proved, then your verdict must be for the plaintiff.

[CF, p. 784 (Instruction No. 7).]

After the three-day jury trial, the jury returned the following signed verdict form:

VERDICT FORM
<p>We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:</p> <p>1. Was plaintiff Christopher Mosley's vehicle searched by defendant Brendan Daves, while acting as a peace officer, without a warrant on or about April 25, 2021? (Yes or No)</p> <p>ANSWER: <u>yes</u></p> <p>If, the answer to this question is "No," your verdict must be for defendant and you should not answer Question 2, but shall sign the verdict form. If the answer to Question 1 is "Yes," go on and answer Question 2 below.</p> <p>2. Was defendant Brendan Daves' warrantless search of plaintiff's vehicle justified as an exception to the warrant requirement as a protective sweep? (Yes or No)</p> <p>ANSWER: <u>No</u></p> <p>If, the answer to this question is "Yes," then your verdict must be for defendant and you should not answer question 3 but shall sign the verdict form. If the answer to Question 2 is "No," then you shall state the amount of damages that you determine plaintiff should recover.</p> <p>3. State the amount of damages, if any, that the plaintiff had that were caused by the conduct of the defendant.</p> <p>ANSWER: \$ <u>1</u></p>

[CF, p. 791 (Verdict Form).]

On January 16, 2024, Daves filed his Notice of Appeal. [CF, pp. 1038-1045.] Daves raised four issues on appeal, but only the first issue is before this Court on certiorari; specifically, whether the trial court erred in providing jury instructions that misstate the law pertaining to protective sweeps, the applicable burden of proof, and whether justification for a protective sweep is an affirmative defense, shifting the burden to Daves. Daves filed his Opening Brief on July 1, 2024; Mosley filed his Answer Brief on October 7, 2024; and Daves filed his Reply Brief on October 28, 2024. The appellate court heard oral argument on August 29, 2025.

C. Order Presented for Review.

The Colorado Court of Appeals issued its published opinion on October 2, 2025. It agreed with the trial court that in this case brought under C.R.S. § 13-21-131, Daves's assertion that the protective sweep of Mosley's vehicle was based on reasonable suspicion amounted to an affirmative defense, shifting the burden of proof to Daves. The appellate court affirmed the trial court's judgment and remanded the case to the trial court to determine Mosley's reasonable appellate attorney fees and costs.

Daves petitioned this Court for writ of certiorari on December 1, 2025, and attached the appellate court's opinion as Appendix A, *Mosley v. Daves*, 2025 COA 80, 580 P.3d 584. Daves's Petition for Certiorari was granted on June 29, 2026.

III. SUMMARY OF THE ARGUMENTS

The Court of Appeals held that Daves had the burden of proving the affirmative defense that he had reasonable suspicion to conduct a protective sweep of Mosley's vehicle. In doing so, the appellate court stated that a protective sweep is an exception to the warrant requirement. However, the Court of Appeals based its holdings on a flawed premise; that is, that a protective sweep of a vehicle requires a warrant—it does not, as established in *Michigan v. Long*, *infra*.

This distinction is material. Unlike searches that fall under exceptions to the warrant requirement, cases involving protective sweeps require only that the officer have reasonable suspicion to search a vehicle. This affects the burden of proof in a subsequent civil rights action because protective sweeps are not presumptively unreasonable. Indeed, in federal § 1983 cases involving searches that require only reasonable suspicion, such as a *Terry* stop, or as here, a protective sweep under *Long*, the plaintiff carries the burden of proving by a preponderance of the evidence that the police officer did not have reasonable suspicion to conduct a protective sweep of his vehicle. As Colorado Courts follow federal precedent in these cases, the same should be true for plaintiffs bringing these claims under the Enhance Law Enforcement Integrity Act (“LEIA”).

The Court of Appeals' decision directly conflicts with the well-established

law set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983), as well as the law in *People v. Archuleta*, 980 P.2d 509 (Colo. 1999), all of which provide that protective sweeps are not presumptively unreasonable under the Fourth Amendment. Execution of a protective sweep requires neither a warrant nor probable cause, and the appellate court erred by framing a protective sweep as an exception to the warrant requirement, and shifting the burden to Daves to prove an affirmative defense of legal justification. Accordingly, this Court should reverse the Court of Appeals, and remand with directions to reverse the trial court's judgment and grant a new trial.

IV. ARGUMENTS

To assess the legality of a search under the Fourth Amendment, Courts must first determine:

- the type of police encounter: arrests and full-scale searches, consensual encounters, limited non-invasive searches, investigatory searches, limited searches for officer safety (protective sweeps and *Terry* pat-downs), and protective sweeps of residences versus vehicles;
- whether the case is criminal or civil (each carrying different burdens of proof, generally favoring the defendant), which in a civil case is the police officer; and

- the type of claim that is brought: certain Colorado common law torts (which have affirmative defenses for which the officer carries the burden of proof), Section 1983 constitutional claims, or constitutional claims brought under LEIA.

Different legal standards and burdens of proof apply depending on these factors. This case involves a civil claim under LEIA related to a protective sweep of a vehicle. As such, the burden of proof should have always remained with Mosley. Instead, the appellate court improperly conflated the above types of cases, and incorrectly held that Daves bore the burden of proving he had reasonable suspicion as an affirmative defense. This is reversible error. This Court should reverse and remand to the trial court for a new trial.

A. This Court should hold that a plaintiff in a civil case brought under LEIA carries the burden of proving that the police officer defendant did not have reasonable suspicion to conduct a vehicular protective sweep.

1. Standard of Review and Issue Preservation.

Determining which party bears the burden of proof is a question of law, which this Court reviews *de novo*. See *LeHouillier v. Gallegos*, 2019 CO 8, ¶ 18, 434 P.3d 156. Relying on *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004), the Court of Appeals ruled that Daves preserved the issues accepted for review by this Court. See *Mosley v. Daves*, 2025 COA 80, ¶ 21, 580 P.3d 584; *see also, Martinez v. People*,

2015 CO 16, ¶ 14, 344 P.3d 862. Daves submitted proposed jury instructions and a verdict form to the trial court [CF, pp. 753, 756-757], and at the jury instruction conference, argued that the burden of proof rested with Mosley to show by a preponderance of the evidence that Daves did not have reasonable suspicion to conduct a protective sweep of the vehicle. [TR (7/25/23), pp. 252:12-22, 253:1-4, 254:2-255:17, 259:3-25, 260:23-263:21.]

2. Discussion of Grounds for Seeking Reversal.

a. Overview of LEIA.

“In 2020, the Colorado General Assembly created a new cause of action against peace officers for violation of a plaintiff’s civil rights.” *Ditirro v. Sando*, 2022 COA 94, ¶ 1, 520 P.3d 1203 (internal quotation marks omitted). The Enhance Law Enforcement Integrity Act, C.R.S. § 13-21-131(1), allows a plaintiff to sue a peace officer who, under color of law, subjects or causes the plaintiff to be subjected to the deprivation of an individual right secured by the bill of rights in Article II of the Colorado Constitution. *See id.*; *Shash v. City of Pueblo*, 770 F.Supp.3d 1279, 1306 (D. Colo. 2025).

“In many respects [C.R.S. § 13-21-131] is similar to 42 U.S.C. § 1983, which authorizes a private right of action against a person ‘who, under color of any statute..., subjects, or causes to be subjected, any citizen of the United States...to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”” *Bullock v. Brooks*, 2025 COA 6, ¶ 14, 565 P.3d 1091 (citing *Woodall v. Godfrey*, 2024 COA 42, ¶13, 553 P.3d 249). The primary difference between the state and federal statutes is that under LEIA, qualified immunity is not a defense to liability. *Bullock*, ¶ 14.

b. LEIA follows federal jurisprudence.

Woodall established that C.R.S. § 13-21-131 is similar to 42 U.S.C. § 1983, and the Fourth Amendment to the U.S. Constitution is identical to Article II, Section 7 of the Colorado Constitution. *Woodall*, ¶ 13 (citing *People v. Rister*, 803 P.2d 483, 489 (Colo. 1990)). As such, this Court may look to cases analyzing § 1983 claims for unreasonable searches as persuasive authority. *Woodall*, ¶ 13 (citing *People v. Dunaway*, 88 P.3d 619, 630 (Colo. 2004) (“Where the analogous federal and state constitutional provisions are textually identical, [the court has] always viewed cases interpreting the federal constitutional provision as persuasive authority.”) (alteration added); *P.W. v. Child.’s Hosp. Colo.*, 364 P.3d 891, 897 (Colo. 2016) (“With no Colorado case directly on point, we look to the decisions of other jurisdictions for persuasive guidance.”)).

Relying on federal civil trials involving Fourth Amendment searches and seizures, Colorado courts should similarly incorporate the law upon which the

protective sweep doctrine is based. In federal § 1983 cases, in order to succeed on a claim for an unconstitutional *Terry* stop, the plaintiff must prove: (1) the defendant seized the plaintiff; (2) the defendant did not have reasonable suspicion that the plaintiff had committed a crime; and (3) the defendant acted under color of law. *See Terry*, 392 U.S. at 19; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also, Florida v. Bostick*, 501 U.S. 429, 434 (1991); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *United States v. Snow*, 656 F.3d 498, 500 (7th Cir. 2011).¹ These elements are reflected in the civil pattern jury instruction in the Seventh Circuit. *See Seventh Circuit Pattern Jury Instructions* (7.06 Fourth Amendment: *Terry* (Investigatory) Stop).

“If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must decide for Plaintiff, and go on to consider the question of damages.” *Id.* “If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must decide for Defendant, and you will not consider the question of damages.” *Id.* “You may have heard the phrase, ‘probable cause.’ Probable cause is not required for the type of seizure you are considering. You should consider only whether there was reasonable suspicion for the seizure....” *Id.*

¹ The Tenth Circuit does not have its own pattern jury instructions for civil cases.

In the Eleventh Circuit, in order to succeed on a claim for an unlawful *Terry* stop, the plaintiff must prove: (1) that he was subjected to an unreasonable investigatory stop; (2) the defendant's conduct caused the plaintiff's injuries; and (3) the defendant acted under color of law. *See United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011); *Terry*, 392 U.S. at 19-20, 30. These elements are reflected in the civil pattern jury instructions in the Eleventh Circuit. *See Eleventh Circuit Pattern Jury Instructions* (5.3—42 U.S.C. § 1983 Claims—Fourth Amendment Claim—Private Person Alleging Unlawful *Terry* Stop). “If you find the plaintiff has proved each fact that he must prove, you must decide the issue of his damages. If you find that the plaintiff has not proved each of these facts, then you must find for the defendant.” *Id.*

A survey of the other federal circuit civil pattern jury instructions is further supportive of Daves's position that the burden remained with Mosley throughout the trial to show that Daves did not have reasonable suspicion to conduct a protective sweep of his vehicle.

The Third Circuit Model civil jury instructions state: “If you find that a plaintiff has proved by a preponderance of the evidence that a stop occurred, then you must decide whether the stop was justified by ‘reasonable suspicion.’” *See Third Circuit Model Jury Instructions* (4.12.1 – Section 1983 – Unlawful Seizure – *Terry*

Stop and Frisk); *Karnes v. Skrutski*, 62 F.3d 485, 492 (3d Cir. 1995), *abrogated on other grounds by* *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007), (citing *Terry*, 392 U.S. at 21); *Adams v. Williams*, 407 U.S. 143, 146 (1972); *U.S. v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006).

The Fifth Circuit Pattern civil jury instructions state that to recover for an unreasonable seizure in the form of a *Terry* stop, Plaintiff has to prove by a preponderance of the evidence that: (1) Defendant committed an act that violated the constitutional right Plaintiff claims was violated; (2) in doing so Defendant acted under color of law; and (3) Defendant's act was the cause of Plaintiff's damages. *See Fifth Circuit Pattern Jury Instructions* (10.1 – 42 U.S.C. Section 1983 (Unlawful Seizure); *United States v. Wise*, 877 F.3d 209, 222 (5th Cir. 2017); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 208-09 (5th Cir. 2009); *Terry*, 392 U.S. at 21.

In the Eighth Circuit, for a claim of unreasonable stop, the Plaintiff must prove: (1) Defendant seized Plaintiff; (2) Defendant did not have a “reasonable suspicion” that Plaintiff had committed a crime; (3) as a direct result, Plaintiff was injured; and (4) Defendant acted under color of law. *See Eighth Circuit Model Jury Instructions* (4.51 Elements of Claim: Unreasonable Stop); *Terry*, 392 U.S. at 24; *Mendenhall*, 446 U.S. at 554; *Hodari*, 499 U.S. at 628; *Waters v. Madson*, 921 F.3d 725, 736-39 (8th Cir. 2019).

The Ninth Circuit Model Civil Jury Instructions concerning *Terry* stops state:

In general, a seizure of a person for an investigatory stop is reasonable if, under all of the circumstances known to the officer at the time: (1) the officer had reasonable suspicion that the person seized was engaged in conduct justifying an investigation; and (2) the length and scope of the seizure was reasonable. To prove the seizure in this case was reasonable, the plaintiff must prove by a preponderance of the evidence that the officer lacked reasonable suspicion to stop him or that the length or scope of the stop was excessive.

See Ninth Circuit Model Civil Jury Instructions (9.23 Particular Rights – Fourth Amendment – Unreasonable Seizure of Person – Exception to Warrant Requirement – *Terry* Stop); *Terry*, 392 U.S. at 23-27; *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

The Ninth Circuit Model Civil Jury Instructions concerning *Terry* frisks state, in part: “A seizure for weapons is permissible if, under all the circumstances known to the officer at the time: (1) the officer had a reasonable suspicion that the person was armed and presently dangerous to the officer or to others; and (2) the scope of the search was strictly limited to that which is necessary for the discovery of weapons.” *See Ninth Circuit Model Civil Jury Instructions* (9.24 Particular Rights – Fourth Amendment – Unreasonable Search – Exception to Warrant Requirement – *Terry* Frisk); *Terry*, 392 U.S. at 24; *Adams*, 407 U.S. at 146 (“The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.”).

These instructions make clear that it is the plaintiff's burden to prove that the defendant did not have reasonable suspicion that the plaintiff committed a crime. This distinction is meaningfully different than the instruction that was given in this case, which did not require Mosley to prove a lack of reasonable suspicion, but instead, required Mosley to prove only that there was a search conducted without a warrant, which was uncontested. [CF, p. 778 (Instruction No. 1); p. 784 (Instruction No. 7).] This improperly placed the entire burden of proving the reasonableness of the protective sweep on Daves.

In sum, there is no provision in any federal circuit civil pattern jury instruction on *Terry* stops stating the defendant has the burden of proving he had reasonable suspicion to conduct the protective sweep, nor is there any provision that “legal justification” is an affirmative defense to such a claim, for which the defendant would carry the burden of proof. *See id.* This Court should hold that the same is true for a claim under LEIA.

c. Placing the burden on the plaintiff to prove a lack of reasonable suspicion, an essential element of an unlawful search claim, is consistent with the historical jurisprudence.

“The Fourth Amendment to the United States Constitution guards citizens against ‘unreasonable searches and seizures’ by the police.” *People v. Johnson*, 2024 CO 47, ¶ 23, 549 P.3d 1008 (citing U.S. Const. amend. IV). “The Colorado

Constitution likewise protects citizens from unreasonable searches and seizures.” *Id.*, at ¶ 23, n.4 (citing Colo. Const. art. II, § 7). A warrantless search and seizure is presumptively unreasonable unless one of the exceptions to the warrant requirement applies including probable cause and exigent circumstances, the emergency aid doctrine, or consent. *See People v. Pate*, 71 P.3d 1005, 1010-11 (Colo. 2003); *People v. Najjar*, 984 P.2d 592, 595 (Colo. 1999). Like this case, however, there are minimally invasive frisks that do not require a warrant and are not considered presumptively unreasonable, including investigatory stops and certain limited searches for officer safety purposes.

In *People v. Archuleta*, 980 P.2d 509, 512 (Colo. 1999), this Court held that there are three basic types of police contact: (1) consensual encounters; (2) arrests or full-scale searches; or (3) intermediate forms of intrusion, such as investigatory stops or limited searches. Consensual encounters do not trigger Fourth Amendment scrutiny. *Id.* “Arrests and full-scale searches, on the other hand, are subject to the Fourth Amendment’s reasonableness requirement.” *Id.* “In order to be constitutionally sound, they must be based on warrants issued upon probable cause or on an established exception to the warrant requirement.” *Id.* “These types of contacts are subject to the Fourth Amendment’s reasonableness requirement.” *People v. White*, 2023 CO 43, ¶ 30, 531 P.3d 397. Thus, to be constitutional, a search

must: (1) be supported by warrant based on probable cause, (2) fall under an exception to the warrant requirement, or (3) fall under the in-between category that is not presumptively unreasonable. *See id.*, at ¶¶ 28-30. The in-between category has its own special considerations and applicable precedents.

d. Protective sweeps require reasonable suspicion; they do not require a warrant or probable cause, and thus are not an exception to the warrant requirement.

The issue squarely before this Court pertains to the intermediate type of police contact, the in-between category identified in *Archuleta, supra*. “In the middle of the spectrum between consensual encounters and arrests based upon probable cause exist intermediate forms of police response that may be employed under narrowly defined circumstances upon less than probable cause.” *Id.* (internal quotation marks omitted); *White*, ¶ 28. “It is now axiomatic that ‘a limited seizure of a person, designated an investigatory stop, is permitted by the Fourth Amendment upon reasonable articulable suspicion, not rising to the level of probable cause, that the person is committing, has committed, or is about to commit a crime.’” *Id.*, at ¶ 32 (quoting *People v. Ball*, 2017 CO 108, ¶ 9, 407 P.3d 580); *see also, United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015) (“Reasonable suspicion requires ‘considerably less’ than a preponderance of the evidence and ‘obviously less’ than probable cause to effect an arrest.”); *United States v. Canada*, 76 F.4th 1304, 1307

(10th Cir. 2023) (“Reasonable suspicion demands less than probable cause.”).

This Court held in *People v. Brant*, 252 P.3d 459 (Colo. 2011), that “[w]hether a search or seizure is reasonable depends on the extent of the intrusion; investigatory stops are generally considered an intermediate intrusion that may take place under narrowly defined circumstances.” *Id.* at 462. Recognizing that in this case, the issue is not one of whether an investigatory stop of a vehicle was appropriate, but rather, whether there was reasonable suspicion to conduct a protective sweep of a vehicle, the *Brant* Court nevertheless provided the legal basis for a protective sweep. “If the police have an articulable and objectively reasonable belief that a person in the car may be armed and dangerous, they may conduct a protective search of the person and the passenger area of the car.” *Id.*; *People v. Baker*, 2026 CO 41, ¶ 18, 589 P.3d 912. “The scope of the protective search of the passenger area of the vehicle is limited to areas in which a weapon may be placed or hidden.” *Brant*, 252 P.3d at 463.

It is important to distinguish between an investigatory stop of a vehicle and a protective sweep of a vehicle. The Court in *People v. Delacruz*, 2016 CO 76, 384 P.3d 349, found that “[i]n general, warrantless searches and seizures are unreasonable, unless an exception to the warrant requirement applies.” *Id.*, at ¶ 13. “Under one such exception, a police officer may be entitled to conduct a brief

investigatory stop of a motorist if the officer has reasonable suspicion that the motorist has committed a traffic violation.” *Id.*, at ¶ 13. “During an investigatory roadside stop, if a police officer has an articulable and objectively reasonable belief that a vehicle occupant may be armed and dangerous, the officer may conduct a protective *Terry*-type search of the vehicle’s passenger compartment and occupants for weapons.” *Id.*, at ¶ 14 (citing *Brant*, 252 P.3d at 462; *Long*, 463 U.S. at 1049-50; *Terry*, 392 U.S. at 27); *see also*, *U.S. v. Ibarra-Sanchez*, 199 F.3d 753, 760, n.7 (5th Cir. 1999) (describing a “protective sweep” as a “*Terry* pat-down” of a vehicle).

The *Delacruz* Court touched upon the purpose of a protective sweep, stating it “is not to discover evidence of crime, but to allow an officer to pursue an investigation without fear of violence.” *Delacruz*, ¶ 16. This distinction is what makes a protective sweep different from an investigatory stop. An investigatory stop *is* an exception to the warrant requirement as it is done in furtherance of determining whether a crime was committed. *See Delacruz*, ¶ 13; *People v. Smith*, 13 P.3d 300, 306 (Colo. 2000) (“Although investigatory stops may be conducted upon less than probable cause, they are still subject to the reasonableness requirements of the Fourth Amendment.”). A protective sweep, on the other hand, *is not per se* an exception to the warrant requirement because it is not in and of itself an investigation into whether a crime was committed. Rather, a protective sweep is carried out for

officer safety purposes.

While the Tenth Circuit in *U.S. v. Williams*, 169 F.4th 1227, 1234 (10th Cir. 2026), stated that a protective sweep is an exception to presumptively unreasonable “warrantless searches,” the analysis in *Williams* relies on the purpose of protective sweeps (officer safety) as set forth in *Canada, Long*, and *Terry, supra*, and adopted by this Court in *Delacruz*. See *Delacruz*, ¶ 16. *Williams* does not equate a protective sweep with an investigatory search in furtherance of investigating a crime, requiring probable cause, and is consistent with this Court and the U.S. Supreme Court in holding that a protective sweep requires reasonable suspicion. See *Williams*, 169 F.4th at 1234 (permitting protective sweeps of areas in which a weapon may be placed or hidden if the police reasonably suspect that a suspect poses a danger and may gain immediate access to a weapon).

As articulated in *Delacruz*, a protective sweep “is justified by the particular hazards confronting law enforcement during roadside encounters with drivers and passengers of automobiles.” *Id.*, at ¶ 16; *Baker*, ¶ 18.

Indeed, the U.S. Supreme Court has emphasized that a roadside *Terry* investigation is a ‘close-range’ investigation that takes place when the officer is particularly vulnerable, in part because a full custodial arrest has not been effected and the officer must make a quick decision as to how to protect himself and others from possible danger.

Delacruz, ¶ 16 (citing *Long*, 463 U.S. at 1052).

“A warrantless protective search of a vehicle must serve *the purpose of ensuring officer safety*, which requires that the officer possess an articulable and objectively reasonable belief that a vehicle occupant may be armed.” *Delacruz*, ¶ 18 (emphasis added); *see also*, *Terry*, 392 U.S. at 27 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”). “The purpose of a protective [sweep] is to neutralize threats to officer safety.” *Delacruz*, ¶ 21 (alteration added).

The *Long* Court similarly describes a protective sweep’s purpose as one to ensure officer safety:

Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if 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 officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Long, 463 U.S. at 1049 (citing *Terry*, 392 U.S. at 21).

The distinction between investigatory searches, which require a warrant, and

protective sweeps, which are presumptively reasonable, is fundamental to why it would be improper to hold that an officer must prove reasonableness as an affirmative defense in a civil case involving a protective sweep. To hold otherwise would require a defendant officer in a civil case to prove the reasonableness of a search when a protective sweep is already presumed to be reasonable. Instead, the burden properly lies with the plaintiff to prove lack of reasonableness.

e. Burden of Proof Overview.

“There are two distinct elements of the burden of proof—the burden of production and the burden of persuasion.” *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287 (3d Cir. 2006) (citing *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) (“The burden in a civil case involves not one but two elements: the burden of going forward with proof (the burden of production) and the burden of persuading the trier of fact (the burden of proof).”) (internal quotation marks omitted)). “Under Fed.R.Evid. 301, a presumption in a civil case imposes the burden of production on the party against whom it is directed, but does not shift the burden of persuasion.” *McCann*, 458 F.3d at 287. The same holds true under C.R.E. 301. *See Stuart ex rel. Stuart v. Rice*, 47 P.3d 316, 321 (Colo. 2002) (“When our rule is similar to the federal rule, we may look to the federal authority for guidance in construing our rule.”)

“A rebuttable presumption is different from a ‘burden of proof’ applicable to

a claim in that the imposition of a presumption on an evidentiary point neither relieves a party nor imposes on a party the ultimate burden of proof.” *Board of Assess. Appeals v. Sampson*, 105 P.3d 198, 205 (Colo. 2005) (citing C.R.E. 301). “As a general notion, a rebuttable presumption lends weight to particular inferences from a stated set of facts, but can be overcome by the party against whom the presumption operates.” *Id.* at 204. Colorado Rule of Evidence 301, which deals with rebuttable presumptions, states:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet this presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id. at 204-205; *People v. Gallegos*, 692 P.2d 1074, 1078 (Colo. 1984) (“In civil cases, a presumption operates to place upon the adverse party the burden of producing evidence sufficient to rebut the presumption, while retaining the burden of persuasion where it originally lay.”).

f. A civil plaintiff generally carries the burden of proof.

It is one of the most basic propositions of law that the plaintiff bears the burden of proving his case. See *Pioneer Centres Holding Co. Emp. Stock Ownership Plan and Trust v. Alerus Fin.*, 858 F.3d 1324, 1335 (10th Cir. 2017) (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“Perhaps the broadest and most

accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.” (citing C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3d ed. 2003)). “This is because the party who ‘seeks to change the present state of affairs . . . naturally should be expected to bear the risk of failure of proof or persuasion.’” *Pioneer Centres*, 858 F.3d at 1335 (quoting *Schaffer*, 546 U.S. at 56; 2 J. Strong, *McCormick on Evidence* § 337, p. 412 (5th ed. 1999)). “[T]ime and again, the Court has articulated the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Hawkins v. Schwan’s Home Serv., Inc.*, 778 F.3d 877, 886 (10th Cir. 2015) (internal quotation marks omitted).

This fundamental rule is not without exceptions. For example, in specific circumstances, “certain elements of a plaintiff’s claim . . . can fairly be characterized as affirmative defenses or exemptions.” *Pioneer Centres*, 858 F.3d at 1335. That is not the case here. Where the plain text of the statute is silent as to which party carries the burden of proof, as is the case in C.R.S. § 13-21-131, “the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.” *Pioneer Centres*, 858 F.3d at 1335 (quoting *Schaffer*, 546 U.S. at 56) (alteration supplied). “Absent some reason to believe that Congress intended otherwise, . . . the burden of [proof]

lies where it usually falls, upon the party seeking relief.” *Pioneer Centres*, 858 F.3d at 1335 (quoting *Schaffer*, 546 U.S. at 57-58) (alteration added).

g. A Section 1983 civil rights plaintiff generally carries the burden of proof.

It is axiomatic that a “civil rights plaintiff proceeding under § 1983 must allege and prove, by a preponderance of the evidence, that (a) some person has deprived him of a federally protected right, and (b) the person who has deprived him of that right acted under color of state law.” *Houston v. Reich*, 932 F.2d 883, 890 (10th Cir. 1991) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)); *see also*, *Est. of Beauford v. Mesa Cnty., Colo.*, 35 F.4th 1248, 1273 (10th Cir. 2022) (plaintiff’s burden under § 1983 to establish what the defendant did and how that act violated his constitutional rights). Similarly, “to prove a claim under [C.R.S. § 13-21-131], a plaintiff must establish that there was a violation of a right embodied in the bill of rights of the Colorado Constitution.” *Johnson v. Staab*, 2025 COA 45, ¶ 21, 571 P.3d 939.

A plaintiff ordinarily retains the burden of proof throughout the trial in a suit brought pursuant to 42 U.S.C. § 1983. *See Der v. Connolly*, 666 F.3d 1120, 1128 (8th Cir. 2012) (citing *Bogan v. City of Chicago*, 644 F.3d 563, 568 (7th Cir. 2011)). “Thus, employing a criminal burden of proof in a § 1983 civil action is contrary to established principles governing civil trials, namely, that the ultimate risk of

nonpersuasion must remain squarely on the plaintiff.” *Der*, 666 F.3d at 1128 (citing *Bogan*, 644 F.3d at 570) (quotations and alterations omitted).

Even if a presumption of unreasonableness arises from the fact of a warrantless search, that does not serve in a civil case to shift the burden of persuasion to defendant. *See Sampson*, 105 P.3d at 205 (“[T]he imposition of a presumption on an evidentiary point neither relieves a party nor imposes on a party the ultimate burden of proof.”); C.R.E. 301; *Der*, 666 F.3d at 1128; *Valance v. Wisel*, 110 F.3d 1269, 1279 (7th Cir. 1997).

In short, a protective sweep of a vehicle requiring reasonable suspicion is not an affirmative defense in a civil case brought under §1983, and this Court should likewise hold that it is not one under LEIA. To do so would be logically inconsistent because, as discussed, a protective sweep is presumptively reasonable. Therefore, any ruling that shifts the burden of proof in an unreasonable search or seizure case where the law enforcement action at issue was a protective sweep of a vehicle would be improper.

- h. The appellate court erred in holding that a warrant was required for a protective sweep, a protective sweep is an exception to the warrant requirement, and Daves had the burden of proof.**

In laying out the framework for “warrantless searches,” Daves does not disagree with the appellate court’s reliance on *People v. Berdahl*, 310 P.3d 230, 234

(Colo. App. 2012), for the proposition that “[a] warrantless search is presumptively unreasonable under the Fourth Amendment . . . subject to only a few narrowly delineated exceptions.” *Mosley*, ¶ 13. Rather, Daves disagrees that a protective sweep of a vehicle requires a warrant. Accordingly, the appellate court’s opinion—which appears to base its legal rationale on the premise that a protective sweep of a vehicle requires a warrant—renders the balance of the legal analysis flawed, because there is not a warrant requirement in the first instance for this non-intrusive limited search for officer safety purposes.

Unlike arrests and full-scale searches, which are presumptively unreasonable, *see Archuleta, White, supra*, protective sweeps are *not* presumptively unreasonable. “[P]rotective sweeps do not require warrants . . . [they] exist for officer safety.” *United States v. Raban*, 162 F.4th 1223, 1231 (10th Cir. 2025) (citing *Long*, 463 U.S. at 1051; *Canada*, 76 F.4th at 1309). In *United States v. McGregor*, 158 F.4th 1082 (10th Cir. 2025), although a criminal case, the Tenth Circuit analyzed whether a protective sweep of a vehicle was supported by reasonable suspicion. *Id.* at 1091. “While we generally require officers to have a warrant to search, a warrantless search is reasonable in some situations—including certain protective sweeps of vehicles.” *Id.* at 1092 (citing *Canada*, 76 F.4th at 1307). “More specifically, one of those situations is when a search is necessary for officer safety.” *McGregor*, 158 F.4th at

1092 (citing *Long*, 463 U.S. at 1049-50).

The appellate opinion in this case further states: “[i]n criminal cases, the prosecution bears the burden of establishing that a warrantless search falls within one of the exceptions to the warrant requirement.” *Mosley*, ¶ 14. (citing *Pate*, 71 P.3d at 1010). Again, Daves does not take issue with this general statement of the law. The issue here, however, is two-fold: first, this case is not a criminal case; second, the protective sweep of Mosley’s vehicle did not require a warrant or probable cause—it required reasonable suspicion, a standard that is less than probable cause. *See White*, ¶ 32; *Canada*, 76 F.4th 307 (“Reasonable suspicion demands less than probable cause.”).

Citing to *People v. Allen*, 2019 CO 88, ¶ 16, 450 P.3d 724, the Court of Appeals stated: “[t]he protective sweep doctrine is one such exception [to the warrant requirement] that allows police to search a vehicle without a warrant when they have a reasonable suspicion that there are weapons in the vehicle.” *Mosley*, ¶ 14 (alteration added). The *Allen* Court held that the officers’ protective sweep of the vehicle was impermissible because it occurred *after* Allen had left the vicinity of the vehicle and location of the traffic stop, and the officers had “completed their investigation.” *Allen*, ¶¶ 23-28. “Whatever danger the officers may have faced during this roadside encounter, it had clearly dissipated by the time they inventoried

the Cadillac.” *Allen*, ¶ 28. A careful reading of *Allen* demonstrates that a protective sweep of a vehicle is not *per se* an exception to the warrant requirement because a protective sweep is not investigatory in nature; it is carried out for officer safety purposes. *Id.*, at ¶ 28. The *Allen* Court’s holding is consistent with this principle.

The three “exceptions” to the warrant requirement the *Allen* Court identified are as follows: (1) “seiz[ure] [of] a vehicle and inventory [of] its contents in furtherance of community caretaking functions;” (2) “a protective [sweep] for weapons...in the vehicle’s passenger compartment;” and (3) “the automobile exception, [which] authorizes an officer to perform a search of an automobile if he has ‘probable cause to believe that the automobile contains evidence of a crime.’” *Allen*, ¶ 16 (alteration added).

The first “exception,” the inventory exception—or community caretaking exception—requires neither reasonable suspicion nor probable cause and, as such, is irrelevant to the present discussion of the issues on appeal. *See People v. Thomas*, 2021 COA 23, ¶ 13, 488 P.3d 1191 (“[O]fficers may seize and remove vehicles from the streets as part of their administrative community caretaking responsibilities, provided that the seizure conforms to standardized criteria limiting police discretion.”). The third “exception,” “the automobile exception,” however, requires probable cause: “If a car is readily mobile and probable cause exists to believe it

contains contraband, the Fourth Amendment...permits police to search the vehicle without more.” *People v. Furness*, 2025 CO 16, ¶ 17, 565 P.3d 1078 (internal quotation marks omitted).

The second “exception,” a protective *sweep* of a vehicle, is not *per se* an exception to the warrant requirement. This is because, as set forth above in Section IV.A.2.d. of this brief, a protective sweep is a limited non-invasive *frisk* of a vehicle for officer safety purposes and requiring reasonable suspicion, which is not presumptively unreasonable. *See Brant*, 252 P.3d at 462; *Long*, 463 U.S. at 1049-50; *Terry*, 392 U.S. at 27. *Terry* held that a reasonable search for weapons was allowed when the individual was believed to be armed and dangerous regardless of whether the officer had probable cause to arrest the individual for a crime. *See Terry*, 392 U.S. at 27. *Terry* did not hold that a pat-down or limited frisk for weapons is an exception to the warrant requirement. The legal principles articulated in *Terry* were applied in the context of a roadside encounter in *Long*, which held that a protective sweep of the passenger compartment of a vehicle was reasonable. *See Long*, 463 U.S. at 1049-50. Like *Terry*, *Long* also did not hold that a protective sweep of a vehicle is an exception to the warrant requirement.

A *search* of a vehicle, on the other hand, requires probable cause, and its purpose is investigatory in nature rendering it presumptively unreasonable under the

Fourth Amendment. *See Archuleta*, 980 P.2d at 512. The Court of Appeals conflated a full-scale *search* with a protective *sweep*, with the effect of a ruling that protective sweeps are presumptively unreasonable, which is inconsistent with the holdings in *Terry*, *Long*, and *Archuleta*; *see also*, *Canada*, 76 F.4th at 1307 (“While we generally require officers to have a warrant to search, a warrantless search is reasonable in some situations—including certain protective sweeps of vehicles.”).

By framing a protective sweep of a vehicle as an exception to the warrant requirement in a case pled under LEIA, the appellate court created a previously non-existent burden of proof on civil police officer defendants akin to the government’s burden in a criminal suppression case. However, the Fourth Amendment legal constructs for an unlawful search in a criminal case are based upon lack of probable cause, whereas reasonable suspicion requires far less than probable cause and is not presumptively unreasonable under the Fourth Amendment as decided by *Terry*, *Long*, and *Archuleta*.

i. Public Policy Considerations.

In stark contrast to the federal circuits’ civil pattern jury instructions as set forth above in Section IV.A.2.b., if this Court were to uphold the Court of Appeals’ decision, the plaintiff would not need to prove anything, and the police officer defendant would carry the entire burden of proof. Taking the appellate court’s

decision to its logical conclusion, the defendant police officer would generally stipulate to the fact that he conducted a “warrantless search,” and he was “acting under color of law.” Then, instead of the plaintiff having the burden to prove by a preponderance of the evidence that the defendant did not have reasonable suspicion, the defendant would have the burden of proving he had reasonable suspicion to conduct a protective sweep of a vehicle. That is precisely what happened here at the trial court.

This posture creates an entirely new burden on defendant police officers to prove the reasonableness of protective sweeps of vehicles, even though no presumption of unreasonableness exists. Furthermore, the intermediate level of police response in cases involving limited non-intrusive searches for weapons which are not presumptively unreasonable, such as the case here, would be subsumed by cases involving full-scale searches that are presumptively unreasonable, rendering *Archuleta*, *Terry*, and *Long* meaningless. A plaintiff in a civil case could simply allege a warrantless vehicle search occurred without having to address the reasonableness of the search in any way.

B. Legal justification for a protective sweep of a vehicle is not an affirmative defense for which the defendant police officer carries the burden of proof.

1. Standard of Review and Issue Preservation.

The standard of review and discussion of issue preservation are the same as those set forth in section IV.A.1, *supra*.

2. Discussion of Grounds for Seeking Reversal.

The Court of Appeals erred by framing a protective sweep as an exception to the warrant requirement, and shifting the burden to Daves to prove an affirmative defense of legal justification. As discussed above, there is no provision in any federal pattern jury instruction stating the defendant has the burden of proving he had reasonable suspicion to conduct a vehicular protective sweep, nor is there any provision that “legal justification” is an affirmative defense to such a claim, for which the defendant would carry the burden of proof. Neither *Terry* nor *Long* hold that reasonable suspicion to conduct a protective sweep of a vehicle constitutes a legal justification for a police officer’s actions amounting to an affirmative defense that a civil police officer defendant must prove by a preponderance of the evidence, and the appellate court erred by holding as such.

Under well-established Fourth Amendment law, and as set forth in the pattern civil jury instructions identified herein, Daves is not required to justify or negate

liability “for conduct that would otherwise result in liability,” as held by the appellate court. *Mosley*, ¶ 15 (citing *State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000)). Rather, the burden falls squarely on Mosley to prove Daves’s protective sweep lacked reasonable suspicion, not the other way around. As such, Daves need not plead or prove any affirmative defense *or any element* of Mosley’s claim. On the contrary, it is Mosley who must prove all the elements of his claim by a preponderance of the evidence in order to prevail, which further renders the Court of Appeals’ reliance on *Nieto* and *Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 18, 351 P.3d 559, immaterial. *See Mosley*, ¶ 15. In sum, the appellate court’s additional holdings concerning a defendant’s burden of proving any affirmative defense are inapplicable to this civil vehicular protective sweep case. *See Mosley*, ¶¶ 16-18.

The Court of Appeals relies on *Crews-Beggs Dry Goods Co. v. Boyle*, 51 P.2d 1026, 1028 (Colo. 1935) (false imprisonment), and *White v. Pierson*, 533 P.2d 514, 516 (Colo. App. 1974) (false arrest), for the proposition that “Colorado courts have long recognized that a defendant’s claim of legal justification is an affirmative defense in certain civil cases concerning constitutional rights.” *Mosley*, ¶ 18. But these cases involve different claims and require probable cause and therefore are of a different category than this case. The Colorado civil pattern jury instructions and the caselaw supporting them, to which the Court of Appeals cites, similarly are of

no import, because they are the instructions for the common law tort claims of false arrest or imprisonment. *Mosley*, ¶ 18, n.3. Moreover, these cases predate this civil case brought under C.R.S. § 13-21-131 (enacted in 2020), rendering them inapplicable.

The appellate court's statement that Daves's argument is, "at its core" an affirmative defense, *Mosley*, ¶ 23, is belied by the elements of the federal civil pattern jury instructions concerning *Terry* searches and seizures, which in no uncertain terms demonstrate that the burden of proof is on Mosley to prove the elements of his claim by a preponderance of the evidence. Those instructions are silent as to assertion of any affirmative defense amounting to legal justification. Thus, the appellate court's holding that "the jury instructions the trial court provided are consistent with case law and the pattern instructions, which place the burden on the defendant to prove an affirmative defense by a preponderance of the evidence," *Mosley*, ¶ 24, was erroneous and warrants reversal from this Court.

The cases cited by the Court of Appeals for the proposition that protective sweeps are characterized as exceptions to the warrant requirement, namely, *Brant*, 252 P.3d at 462, *People v. Altman*, 938 P.2d 142, 146 (Colo. 1997), and *People v. Litchfield*, 918 P.2d 1099, 1103 (Colo. 1996), *Mosley*, ¶ 25, are inapplicable to this case involving a claim under LEIA, because as set forth in *Woodall, supra*, cases

involving LEIA claims should follow federal law concerning the principles laid out in *Terry* and *Long* and articulated in the federal circuit civil pattern jury instructions, which do not recognize any affirmative defense of legal justification, but rather, impose the burden on the plaintiff to prove lack of reasonable suspicion for a claim involving a protective sweep of a vehicle.

The Court of Appeals also misapplied *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1070 (10th Cir. 2010) for the proposition that federal cases have analyzed “legal justification as an affirmative defense” in the “context of a civil rights claim filed under 42 U.S.C. § 1983.” *Mosley*, ¶ 26. *Armijo* involved a warrantless search inside a home, which searches are, as discussed in *Archuleta*, *supra*, a type of search that would require a warrant and thus presumptively unreasonable. The *Armijo* Court cited to a criminal case, and without any analysis, stated the officers bore the burden of establishing exigent circumstances justifying warrantless entry into the residence. The *Armijo* Court did not hold that a protective sweep of a vehicle is presumptively unreasonable triggering a potential burden shift. Similarly, *Mascorro v. Billings*, 656 F.3d 1198, 1205 (10th Cir. 2011), cited by the appellate court, *Mosley*, ¶ 26, pertained to exigent circumstances for a warrantless entry, and is not persuasive in this case involving a vehicular protective sweep.

While there is a split amongst the circuits as to which party bears the burden

of proof in Fourth Amendment § 1983 civil cases alleging an unlawful *search* or an unlawful arrest lacking a warrant and probable cause, that is not the case here, where the search was a presumptively reasonable protective sweep that does not require a warrant. A vehicular protective *sweep* for weapons does not require probable cause and a warrant, nor is a protective sweep an exception to the warrant requirement as applied in full-scale arrests or investigatory searches. Rather, a protective sweep is carried out for officer safety purposes. Accordingly, the Court of Appeals' holdings constitute reversible error.

V. CONCLUSION

For the foregoing reasons, the Court of Appeals' opinion should be reversed as to the issues on which this Court granted certiorari and the case remanded with directions to reverse the trial court's judgment and grant a new trial.

VI. NO REQUEST FOR ATTORNEY FEES

Daves is not seeking attorney fees for this appeal pursuant to C.A.R. 39.1.

Dated: August 24, 2026

Respectfully submitted,

s/ Gillian Fahlsing
Gillian Fahlsing, #33201
OFFICE OF THE AURORA CITY ATTORNEY
Aurora Municipal Center
15151 E. Alameda Parkway, Suite 5300
Aurora, Colorado 80012
(303) 739-7030
gfahlsin@auroragov.org
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of August, 2026, a true and correct copy of the foregoing **OPENING BRIEF** was electronically filed with the Clerk of Court and served via *Colorado Courts E-Filing* to the following:

Adam Frank, Esq.
FRANK LAW OFFICE LLC
1133 N. Pennsylvania Street
Denver, CO 80203
(303) 800-8222
adam@franklawoffice.com
Counsel for Respondent

s/ Camelia Close
Office of the Aurora City Attorney